SUPREME COURT, U. S.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5276

ALBERT D. MUREL, *et al.*,

Petitioners,

v.

BALTIMORE CITY CRIMINAL COURT, *et al.*,

Appellees.

BRIEF OF THE PETITIONERS

KARL G. FEISSNER
WILLIAM L. KAPLAN
THOMAS P. SMITH
FRED R. JOSEPH
ANDREW E. GREENWALD
WALTER E. LAAKE, JR.
Feissner, Kaplan & Smith
6401 New Hampshire Avenue
Hyattsville, Maryland 20783
Attorneys for Petitioners

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BRIEF OF THE PETITIONERS

OFFICIAL AND UNOFFICIAL REPORTS of the Opinions delivered in the Courts below

A. *Daniels v. Director*, 238 Md. 80, 206 A.2d 726 (Md. 1965).

B. *Director v. Daniels*, 243 Md. 16, 221 A.2d 397 (Md. 1966), cert. denied *sub. nom. Avey v. Boslow*, 87 S. Ct. 307, 385 U.S. 940, 17 L. Ed. 2d 219 (1966).

C. *Sas, et al. v. State of Maryland*, 295 F. Supp. 389 (D.C. Md. 1969).

D. *Tippett, et al. v. State of Maryland, et al.*, 436 F.2d 1153 (4th Cir. 1971).

JURISDICTION

The jurisdiction of this Honorable Court is respectfully invoked pursuant to the provisions of Title 28, U.S. Code, Sec. 1254 (28 U.S.C. 1254). The judgment sought to be reviewed was entered by the United States Court of Appeals for the Fourth Circuit on January 4, 1971. A Petition for rehearing and rehearing *en banc* was timely filed and was denied on March 11, 1971 by the United States Court of Appeals for the Fourth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Amendment V, United States Constitution:

> ". . . No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or Naval Forces or in the militia when an actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law . . ."

B. Amendment VI, United States Constitution:

> ". . . In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense."

C. Amendment VIII, United States Constitution:

> ". . . excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted.

D. Amendment XIV, United States Constitution:

> ". . . No state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws . . ."

E. Article 31B of the Annotated Code of Maryland (fully set out in Appendix A), and especially Sec. 5 of Article 31B of the Annotated Code of Maryland, set forth below:

> ". . . for the purposes of this article a defective delinquent shall be defined as an individual who by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity and who is found to have either such intellectual deficiency or emotional unbalance or both as to clearly demonstrate an actual danger to society so as to require such confinement and treatment when appropriate as may make it reasonably safe for society to terminate the confinement and treatment . . ."

F. Article 31B, Section 10, Annotated Code of Maryland *Petition for Review:*

> "(a) Who may file; hearing and determination.– After any person shall have been committed under Sec. 9(b) as a defective delinquent, shall have been confined for a total period, including any period of confinement under his original sentence prior to commitment under Sec. 9(b), equal to two thirds of his original sentence, such person or anyone in his behalf, including the director or any officer or employee of Patuxent Institution, may file a petition requesting that such person be brought before the court in which such petition is filed for the purpose of having the defective delinquency of such person redetermined. . . .
>
> "(b) Application for further review not to be made within three years.– After the right to apply for any such petition for review under the provisions of

this section shall have been exercised once, it shall not again be sought under the provisions of this section within less than three years following the prior seeking of a petition for review from confinement under the same commitment.

"(c) Right to petition for habeas corpus not affected.– The right to review specified in this section shall not be construed to deprive the defendant of his right to petition for habeas corpus as it might otherwise exist."

* * * * * *

"(g) Affidavit required for subsequent petition within one year.– Once a patient has had a determination on the merits of any one petition filed by him pursuant to this section, no subsequent petition prepared by or for him shall be heard by a court of equity within one year of such prior determination, unless, in addition to all other required data, the petition is accomplished by a valid affidavit showing improvement of the patient's mental condition subsequent to the trial. No such affidavit shall be valid if executed by a patient of a private facility or Veterans' Administration hospital. When filed, the petition and affidavit shall be reviewed by the court, and if the affidavit shows an improvement in the patient's mental condition, the petition shall be heard as provided in this section. If no substantial improvement in such condition is shown, the petition shall be dismissed.

G. Article 50, Section 14, Annotated Code of Maryland, *Habeas corpus:*

"(a) At any time, any person admitted to any facility or Veterans' Administration hospital, or anyone, on his behalf, may apply to any appropriate court for a writ of habeas corpus. Such proceeding shall be available to determine the cause and the legality of his admission and continued detention."

H. Article 59, Section 15, Annotated Code of Maryland, *Judicial release:*

"(a) Petition to be filed; respondent.– Any patient may, at any time, subject to the limitations specified in this section, file a petition in the equity court of the county in which he resides or resided at the time of his admission, or in which he is confined for the purpose of securing his release. Any person having a legitimate interest in the welfare of the patient may file the petition on his behalf. The Department shall be the respondent in any such case, unless the patient is a patient in a private facility or a Veterans' Administration hospital, in which case the private facility or the Veterans' Administration hospital shall be named as the respondent."

* * * * *

"(c) Trial by jury.– The petitioner may request that his petition be heard by a jury, and thereafter such trial shall proceed as in a civil action at law.

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Maryland Defective Delinquent Statute is unconstitutionally vague.

B. Whether the procedures embodied in the statute and in trial are applied in such a manner as to offend the due process requirements of the Fifth Amendment and the confrontation requirements of the Sixth Amendment.

C. Whether the proposed objectives of the act are being sufficiently implemented to support its characterization as a civil procedure and to justify the elimination of conventional criminal procedural safeguards.

D. Whether the Eighth Amendment provision against cruel and unusual punishment is offended when the statutory requirement that a defective delinquent be an "actual danger to society" is being applied to offenses against property as well as violence against persons.

E. Whether the Patuxent Institution furnishes sufficient actual treatment to distinguish its inmates from those of

other penal institutions so as to satisfy the equal protection clause of the Fourteenth Amendment.

F. Whether constitutional guarantees of due process and equal protection were violated when the Petitioners were denied leave to employ independent psychiatric experts at government expense.

G. Whether the Petitioners were denied due process of law by the initiation of commitment proceedings under a statute that requires allegations of mere supposition or suspicion of defective delinquency and where that statute permits a court order to be entered *ex parte* without notice or hearing and without the assistance of any counsel for the accused.

H. Whether the Petitioners were deprived of due process of law during the examination stage of their confinement at Patuxent and/or in the finding by the institution of their defective delinquency as a result of patently inherent unreliability of the fact-finding processes and the essential procedural unfairness of administration adjudication by the institution itself.

I. Whether the Petitioners' rights against self-incrimination are violated by the unyielding compulsion upon persons sent to Patuxent for examination to submit to in-depth interrogation and testing in the total absence of procedural safeguards.

J. Whether Petitioners' rights to confront and examine witnesses against them in a judicial hearing for determination of their defective delinquency are adequately preserved by the statutory scheme of defective delinquent proceedings.

K. Whether the standard of "clear and convincing evidence" or "beyond a reasonable doubt" should have been used by the Maryland courts at the commitment proceedings, rather than the standard of "preponderance of the evidence."

L. Whether the Petitioners were unconstitutionally required to incriminate themselves by the statutory procedures for review and re-examination of their commitments.

M. Whether the District Court and the United States Court of Appeals erred in finding that the Maryland act is constitutional on its face, interpretation, application, administration and result.

APPENDIX DESIGNATION

In order to reduce costs the parties have agreed to the use of appendices heretofore used in the United States Court of Appeals for the Fourth Circuit and in the Court of Appeals of Maryland. The two volume joint Appendix used in the Fourth Circuit Court of Appeals will be hereinafter designated as "(J.A. 4)."

The two-volume Joint Appendix used in the Court of Appeals of Maryland which was evidentiarily accepted in the hearing before the United States District Court for the District of Maryland in the matter of *Sas, et al. v. State of Maryland*, 295 F. Supp. 389 (D.C. Md. 1969), will be hereinafter designated as "(J.A. Md.)."

The Appendices not printed are original exhibits used in the District Court. They will be referred to by their exhibit number in that court; *i.e.* "(Ex.)."

STATEMENT OF THE CASE

These cases had their genesis from legal proceedings begun on two (2) different fronts. On July 22, 1964 in the Circuit Court of Prince George's County, Maryland trial was had in *State of Maryland v. Samuel Daniels* for a determination as to whether or not the Defendant was a defective delinquent (J.A. Md. 388). After trial the Defendant was found to be a defective delinquent; on appeal the cause was reversed. *Daniels v. Director*, 238 Md. 80, 206 A.2d 726

(Md. 1965), and the matter remanded to the Trial Court for consideration of the constitutional questions raised. During the same period of time the United States Court of Appeals for the Fourth Circuit rendered its decision in *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964). That opinion remanded the *Sas* case to the District Court for a broad analysis of the Patuxent Institution. The Court of Appeals of Maryland in its decision, *Daniels v. Director, supra*, directed the trial judges in the Circuit Court of Prince George's County to conduct a *Sas*-type hearing into the overall nature of Patuxent which was done and in due course an opinion was rendered upholding the Patuxent Institution (J.A. Md. 1). On appeal the decision of the Circuit Court of Prince George's County was upheld in *Director v. Daniels*, 243 Md. 16, 221 A.2d 397 (Md. 1966), and on writ of *habeas corpus*, the *Avey-Daniels* record was joined with the *Sas* remand cases, which were then consolidated with several pending cases in the United States District Court for the District of Maryland. After trial, and in due course, an opinion was rendered by the United States District Court for the District of Maryland upholding the constitutionality of Patuxent after considering the record made in the Maryland Courts. *Sas, et al. v. State of Maryland*, 295 F. Supp. 389 (D.C. Md. 1969). On appeal to the United States Court of Appeals for the Fourth Circuit, the decision of the District Court was upheld (2 to 1) *sub nom. Tippett, et al. v. State of Maryland, et al.*, 436 F.2d 1153 (4th Cir. 1971), and this Court, in its wisdom, granted its writ of *certiorari*.

The Petitioners in this cause all have a similar history. After conviction in the Circuit Courts of Maryland they were classified as "defective delinquents" pursuant to the provisions of Article 31B of the Annotated Code of Maryland, and sent to the Patuxent Institution in Jessup, Maryland. Finding no relief in the State Courts of Maryland they filed their writs in the United States District Court of Maryland and from the adverse rulings, which were affirmed on appeal by the United States Court of Appeals for the Fourth Circuit, they appear before this Court.

The Patuxent Institution was opened in January 1955 (J.A. Md. 615). The Institution covers approximately ten (10) acres of ground and consists of a complex of facilities enclosed by a fence with six (6) guard towers (J.A. Md. 616). There were at the time of the original Maryland hearings four hundred and eighty-five (485) people incarcerated within the Institution.

An inmate qualifies for Patuxent when he becomes or is determined to be a defective delinquent. A defective delinquent is defined as "an individual who by the demonstration of persistent aggravated anti-social or criminal behavior, evidences a propensity towards criminal activity and who is found to have either such intellectual deficiency or emotional unbalance or both as to clearly demonstrate an actual danger to society so as to require such confinement and treatment when appropriate as may make it reasonably safe for society to terminate the confinement and treatment." Sec. 5, Art. 31B, *The Annotated Code of Maryland.* The trials of inmates which have been reproduced for this Court are Daniels (J.A. 4, 388); Tippett (Ex. 12-15); Murel (Ex. 10-11); and Creswell (Ex. 9). They indicate the pattern that when an individual is sent to Patuxent Institute he is examined by the staff and the staff makes a report to the Court as to whether or not in their opinion the individual is or is not a defective delinquent. If the staff determines that he is not a defective delinquent then the matter is put at rest and there is no appeal by public authority or otherwise against the staff's findings. If, on the other hand, the staff determines that he is, in fact, a defective delinquent then a trial is held in a Circuit Court before judge or jury and the state psychiatrist who examined the defendant is then called to express his opinion as to whether or not the individual is a defective delinquent and the reasons therefor. The judge or jury then makes a determination and if, in fact, the individual is denominated as a defective delinquent he is incarcerated in the Patuxent Institution without maximum or minimum limitations on his sentence. The trial in accordance with the existing practices of Maryland is based

upon extensive hearsay in both the records of the Institution and the testimony of its staff psychiatrist. This includes substantial hearsay as to the alleged background of the inmate.

The writings of the Director of Patuxent reflect various views regarding his institution. In an article, "The Maryland Defective Delinquency Law" (J.A. 4, 501 through 503), the author indicates that the Institution must rely quite heavily on case history criteria and on clinical impressions which are not easily defended as objective standardized measures. The author further recognized that as the statute is written, a disproportionately large percentage of the criminal population may be referred for examination which the author feels is most unwise. They additionally recognize that they are primarily experimenting in a new field in which there is no wide background or experience or generally accepted criteria and that the Institution, in essence, operates under a trial and error method. The Institution is described by its learned Director as a maximum security institution with barred windows, barred doors, around-the-clock surveillance and a strict regard for discipline. Inmates are disciplined if they do not attend "therapy" and the authors opine at the conclusion of their article that the Patuxent Institution is moving into a region of psychiatry which has not been thoroughly explored.

In a later article, "Methods and Experience in Group Treatment of Defective Delinquents in Maryland" (J.A. 4, 503 through 505), the author recognizes, interestingly enough, that deprivation of liberty without an effort at rehabilitation is, in his judgment, unconstitutional. It is further observed that the staff at Patuxent is very limited and that the therapy of the psychiatrist constitutes only a fraction of his working day. The author further states that economy of staff time has made group therapy the treatment of choice at Patuxent and that the professional therapists are at liberty to choose only persons with whom they felt they could work best. The authors also indicate that

the activity group therapy which was most beneficial to certain individuals who could not profit from verbal interaction was discontinued when the worker took a job elsewhere (compare J.A. 4, 443).

Later, the distinguished Director of Patuxent further defines the Institution's role: "The Maryland Defective Delinquent Law; An Eight-Year Follow-Up" (J.A. 4, 506 through 509. The Director writes that psychotics who are committed under the defective delinquent definition have been and are presenting management problems during their deranged periods. He further advises that Court testimony is the major and most time-consuming part of the Institution's activities. He feels that the Defective Delinquent System is too complex for a jury and that treatment, according to him, is only given where appropriate and would be decided by himself.

An inspection of the Patuxent Institution by the American Psychiatric Association Committee headed by Dr. Philip Roche, in a report dated September 20, 1960 (J.A. 4, 491 through 499), indicates in parts pertinent that it is bad medical practice for the evaluating doctor to testify against his inmate patient, which is the practice at Patuxent. The American Psychiatric Association also reported the view of the then Director of Research, Dr. James E. Smith, that with one hundred and twenty (120) to one hundred and thirty (130) men in a treatment program, the Institution would need at least seven (7) full-time doctors for adequate treatment. The report further indicates that the school program had insufficient instructors but that the entire procedure was apparently a trial period for a great social experiment. It is perhaps interesting in comparing the Report of the American Psychiatric Association, with the views of the learned Director, that a private psychiatrist would not be competent to treat inmates in Patuxent Institution considering the general aims of the Institution (J.A. Md. 765).

Inmates are moved in Patuxent according to a tier system, a theoretical reward according to the practice of

Patuxent. However, in fact, according to the original trial transcript in the matter of Daniels, the staff psychologist testified that Daniels was placed on the release tier because of space and administrative problems only, not because he had recovered and that his removal from that tier was strongly motivated by his repulsing a homosexual attack from another inmate (J.A. 4, 443-444). One of the major problems, according to the Institution, is the fact that private psychiatrists do not understand its functioning (J.A. Md. 765) and that the custodial staff has not received any training and is no different from the guards at the penitentiary and that individual interpretations are a matter of great concern (J.A. Md. 4, 204, 205, 256).

The testimony of the original research director, Dr. Smith, reported in the findings of the American Psychiatric Association, that seven (7) full-time doctors would be needed to treat one hundred and twenty (120) individuals (J.A. Md. 770) is apparently correct and accurate based upon sound standards as indicated by the State's witnesses in like institutions in foreign nations (J.A. Md. 674 through 679). The record, however, in this cause indicates that in an overall view the majority of full-time psychiatrists at the Patuxent Institution are only filling half the professional staff (J.A. Md. 781-782). Additionally, the time charts of the Patuxent Institution which seem to bear out the testimony of the witnesses hereinafter set forth, show that treatment is only given half of the time when scheduled. There appears to be only time for fifteen (15) minutes per week per patient based on the statistical chart (J.A. Md. 95-96). Of course, when one considers the extensive problems encountered by curtailed therapeutic space (J.A. Md. 783-784), it would appear unreal that the definition of a defective delinquent is "curtailed" depending on economics of space (J.A. Md. 784).

In addition to the views of the American Psychiatric Association that the Patuxent psychiatrist creates an image of prosecutor rather than of physician, several of the witnesses in the Maryland trials testified to the adverse and,

indeed, cataclysmic effect when doctors are required to testify against their patients and then still attempt to treat them, notwithstanding the fact that there is additional confusion and difficulty when they are constantly changing therapists, such as at Patuxent (J.A. Md. 136, 138, 240, 241, 673, 674, and compare 135, 392). According to the better psychiatric view, in order for a psychiatrist to properly treat a patient, it is necessary that there be mutual respect and trust (J.A. Md. 84 through 87). This, however, was not the case in the matter of Daniels, as his doctor was grossly discouraged (J.A. Md. 95) and when there was a loss of continuity, the result was considered devastating (J.A. Md. 87).

Of the several physicians who testified at the Maryland trials, there was no real difference in meaning between the recidivist criminal and the defective delinquent (J.A. Md. 90, 138, 160 through 171, 177, 181, 182, 216, 217, 352 and 353, 398, 399, 468, 541, 542, 700, 709). Patuxent, in essence, was described as a prison run by a medically-educated director rather than a prison-educated director (J.A. Md. 93, 132, 356, 357, 358, 468, 469). Parenthetically, it might be noted that in the testimony of the Commissioner of Corrections was the view that seventy-five percent (75%) of the inmates in the State Prison System have previous criminal records (J.A. Md. 514); however, after a second time through the State Prison System three (3) out of four (4) of these inmates do not return (J.A. Md. 520 through 521).

Further trial testimony noted (J.A. Md. 700 and J.A. 4, 539) that eighty to ninety percent (80%-90%) of the inmates of the state penitentiary are sociopaths, *i.e.*, psychopaths who fit the definition of a defective delinquent. In the troublesome area of the definition of the defective delinquent, many experts found substantial difficulty because the definition itself was vague and unclear even to psychiatrists (J.A. Md. 273, 68, 69, 93, 94, 138, 258, 314, 347, 348, 400, 401, 776, 777); the learned Director opined that the act differs in different counties of the State of

Maryland because of seemingly different standards (J.A. Md. 772, 773), and he feels further that juries do not fully accept or appreciate their responsibility under the Defective Delinquent Law (J.A. Md. 773, 774). The Patuxent definition was described as general in its terms and is easily made to apply to any circumstances, perhaps even a civil rights demonstration (J.A. Md. 174, 175, 273, 349, 350, 463, 464). Indeed, many prominent experts felt that because psychiatric diagnostic skills are not certain (J.A. Md. 176, 177, 350, 351) that doctors should not be, as they presently are, the ultimate appliers of the law (J.A. Md. 175, 176). The present definition leads only to a "fairly accurate discrimination" so that Patuxent is, in essence, an experiment. (J.A. Md. 197, 198, 242). Unfortunately, the fifty-odd prisoners receiving no treatment for two (2) years (J.A. 4, 518) are unlucky, or are they?

The psychiatric profession does not seem to agree as to what a psychopath is (J.A. Md. 194, 234, 235, 238, 247 through 251, 314); although this is a problem, it would appear to be magnified by differences within the staff at Patuxent and apparently it is further magnified because jurors are required to understand these definitions within a short period of time (Ex. 12, p. 33). Indeed, the psychiatrists themselves all seem to differ as to the meaning of the terms of the statute and their quantitative and qualitative effects (J.A. Md. 122, 130, 131, 134, 165, 166, 194, 195, 198, 200, 250, 251, 698, 699 and then compare with 129 through 127, 130 through 131, 139 through 140, 162 through 163, 193 through 194). These experts seem to realize that the statute does not have any objective measurements (J.A. Md. 90, 91, 130 through 132, 141 through 142, 162 through 164, 388, 389, 799).

All the physicians were in agreement that in order to apply the statute, a good, accurate history was needed (J.A. Md. 131, 135, 173). In the case of *Daniels*, the hearsay history was found to be patently inaccurate, as shown by the testimony of the mother of the child who was allegedly sexually assaulted by this young Negro (J.A. Md. 61, 62,

63; compare with J.A. 4, 403). It would appear then, that past histories which are utilized by the Patuxent Institution are the rankest form of hearsay and are demonstrably inaccurate. The record is abundant that Daniels has not received any effective treatment (J.A. Md. 70, 75, 76, 264, 265, 353, 354, 359), as well as indicating that all who were concerned with him did not find him to be a danger to society or persons (J.A. Md. 69, 178, 353, 354). Inmate Murel's transcript (Ex. 11, p. 52) indicates that except for an assault when he was a fourteen-year (14) old boy, he had committed no offenses against humans, but only offenses against property. In addition, he had been at the Institution almost as long as anyone, but was receiving no treatment whatsoever (Ex. 11, p. 39). He is unfortunately in Patuxent with apparently no mental disorder because he was classified as a psychopath, a finding that the Maryland Court of Appeals says no longer exists.[1] Inmate Murel's redetermination hearing (Ex. 10) on November 30, 1962, took place in a period of approximately thirty (30) or forty (40) minutes, with the Court opining at the conclusion of the eighteen (18) page transcript that for the "boy's own good" we'll find him a defective delinquent (Ex. 10, p. 19). This is to be contrasted with the treatment that he has not received through the many years of his confinement. The trial Court made absolutely no findings as to the requisite statute and the whole State's case, as a matter of fact, was merely the reading of the interview note and report. Indeed, if this was a trial, then it was one in form and not in substance.

As to inmate Tippett, while he is no longer a party to this appeal, having miraculously been released, his trial and the facts of his case present additional evidence of the shocking abuses of the Patuxent one-man power. The offense of Mr. Tippett is that he "stutters" (Ex. 14, p. 31).

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[1] *Director v. Daniels*, 243 Md. 16, 221 A. 2 397 (Md. 1966), and see Ex. 9, p. 45.

Other than that, he seems to be a reasonable and normal sort of person, notwithstanding the fact that he had been at Patuxent since its inception. His first hearing was in 1957, and during that hearing when the learned Doctor Boslow was asked whether or not Patuxent would be able to give Mr. Tippett treatment, stated that this was "beside the point" (Ex. 12, p. 24). The charge to the jury is most enlightening and covers nothing. The Court merely gave the jury a copy of the statutes and sent them to the jury room to deliberate (Ex. 12, p. 32). Predictably, they returned in ten (10) minutes. In 1957, when inmate Tippett was again brought before the Circuit Court for Prince George's County, he was represented by one Richard E. Painter (Ex. 12, p. 1). In the trial in 1959 (Ex. 13), Mr. Tippett, while at the penitentiary, became a defective delinquent and was returned to Patuxent and again found a defective delinquent. In 1963 (Ex. 14, p. 1), inmate Tippett again returned to the Circuit Court, this time to be prosecuted by his former attorney, Richard E. Painter, and the record in the 1963 hearing shows that after eight (8) years in Patuxent he had advanced to the Training Program and lofty title of "tier sanitarian" (Ex. 14, p. 10). It is respectfully suggested to the Supreme Court of the United States that this should read "tear," as we think it nothing more than a crying shame that any individual after ten (10) years, whose major offense is stuttering, and whose former lawyer is now his prosecutor, should be subject to such indignities. It is noted that notwithstanding the comments of the Patuxent Institution in the earlier hearing that inmate Tippett was of low intelligence and had a great deal of difficulty with speech, he was later placed in a class for shop mathematicians. Interestingly enough, in the 1963 hearing it was indicated that inmate Tippett now had organic brain damage, but this had no significance since people with organic brain damage were not supposed to be at Patuxent. The Institution further stated in the 1963 hearing, "he stutters so badly that one can hardly understand him on many occasions. On such times he goes into spasmodic jerking movements of his arms and legs." It was found that

Mr. Tippett was not a bright therapeutic prospect and then the Institution finally admitted to the Court that after ten (10) years no speech therapist had ever been provided for him (Ex. 14, p. 25, p. 87). This notwithstanding the fact that inmate Tippett had never been given vocational training. In 1966 it was decided that with a new lawyer and a different prosecutor, and his own psychiatrist testifying as a witness against him, that inmate Tippett should continue to be a defective delinquent because his basic problem is drinking (Ex. 15, p. 27). Concluding the eloquent defense of inmate Tippett was the jury argument of his counsel, which, if repeated by the members of this Honorable Court in their deliberation would take no more than ten (10) seconds (Ex. 15, p. 40).

Inmate Avey was convicted in Prince George's County of assault with intent to murder and after having been made a party to the original Daniel's matter was sent to Patuxent Institute to determine whether or not he was a defective delinquent. On the advice of his counsel (who is counsel in this matter), inmate Avey, at that time, took the position that he had a Fifth Amendment right against self-incrimination. Accordingly, inmate Avey was destined to remain at Patuxent since this was upheld by the United States District Court. Parenthetically, counsel would note, although it is not a matter of record, that after the decision in the United States District Court inmate Avey did, in fact, speak with the psychiatrist at the Institution and has now been denominated as a "defective delinquent."

At the redetermination hearing of inmate Creswell held in 1966, it appeared that inmate Creswell had seen his psychiatrist seven (7) times since his commitment in 1958 (Ex. 9, p. 44). Ostensibly, the Institution took the position that the inmate was "uncooperative." In addition, it should be noted that in the charge to the jury in the trials of inmates Creswell and Tippett, the Trial Court apparently spoke as an advocate of the Attorney General's Office in praising the Institution (Ex. 13, p. 41; Ex. 9, p. 160), rather than in defining terms. Indeed, in the hearing as to inmate Murel,

the Court threatened the jury in its "charge" that if he was not found a defective delinquent, Petitioner Murel would be released "without strings, probation or anything like that." (Ex. 11, p. 70). The Court in the second Tippett redetermination charged the jury that the burden of proof was on inmate Tippett (Ex. 13, p. 40), whereas in Creswell (Ex. 9, p. 169) and Murel (Ex. 11, p. 70), the Court took the position that the burden of proof was on the State.

As previously noted, the custodial staff at Patuxent Institution, with whom the inmate has his major contact, has no training different than that of the regular prison guards (J.A. Md. 256).

The experts who testified at trial were in almost total agreement that the law is subject to the Director's interpretation and that if an improper person were the Director, it would be a dangerous situation (J.A. Md. 267; then compare 348, 349, 707, 708, 775).

In comparison, the laws of the other states (J.A. 4, 489-490), which allow for indeterminate sentences, provide for acts designed to control sexual psychopaths. That in these other states the qualifications of the psychiatrist are fairly rigid (J.A. 4, 489-490), and that in these other states for the most part the laws are inoperative (J.A. 4, 490). It is well spoken that long ago the American Psychiatric Association's Report (J.A. 4, 498) opined "Patuxent has not succeeded as a scientific research institution intended in the design of its founders."

Recognizing the emphasis placed on the psychologist as well as the psychiatrist, that profession, according to the witnesses, has not reached the state where it can predict individual human behavior with reasonable degrees of certainty (J.A. Md. 534). While they can predict group behavior, individual behavior is extremely difficult to predict and that, in the view of the well recognized prison psychologist, Dr. George Lassen, the Defective Delinquent Act is nothing more than simple punishment (J.A. Md. 535, 536). The term "emotional imbalance," one of the major factors of the definition, is a term which can mean whatever you

want it to mean, depending upon who the tester is (J.A. Md. 539).

Of the testimony of some of the inmates at the original Maryland trials, it is noted that inmate Powers had been at Patuxent for nine (9) years with no treatment (J.A. Md. 553). Inmate Bressler, whose family wanted him treated by his own private psychiatrist, was denied the right to have a private psychiatrist treat him (J.A. Md. 556, 557). Inmate Tippett, as previously pointed out, has a noticeable speech defect but no speech therapy is available (J.A. Md. 588, 589). Inmate Murel, who at the time of the original Daniels' trial had been in seclusion for nine (9) months, was getting his medication from other prisoners (J.A. Md. 592, 593). Inmate Hawkins was at Patuxent for two (2) years with no treatment, although his therapy was started the day before he was scheduled to testify (J.A. Md. 597). Inmate Mosdale had been at the Institute since 1960, and at the time of the Maryland trials had no therapy (J.A. Md. 599), and inmate McDonough had been at the Institution over five (5) years because he is considered uncooperative because of his reliance upon the Fifth Amendment (J.A. Md. 602).[2] Significant was the testimony of guard Allen Levi (J.A. Md. 471-490), who corroborated the fact that the guards have no training and are no different from the guards at the House of Corrections or penitentiary, that their selection process is no different and that only one third (1/3) of the committed population was in therapy in August of 1964 (J.A. 4, 518-530).

Treatment at Patuxent is mostly milieu therapy which, in fact, cannot exist because the major contact of the inmates is with the guards (J.A. Md. 204) and all are agreed that the guards do not have any training whatsoever in psychology, psychiatry or other beneficent prison routines (J.A. Md. 240, 205, 256). Patuxent Institution, which could represent an enlightened approach to penology is, in fact, a hoax. Its release tier is a hoax and housekeeping

[2]See McDonough v. Director, 229 Md. 626, 183 A. 2 368 (1962).

procedure (J.A. 4, 441-445); the staff does not agree on the definition (J.A. 4, 484); the American Psychiatric Association says it is woefully under-staffed (J.A. 4, 491-499); there is no doctor-patient relationship (J.A. 4, 491-499); the Director says the definition is vague and indefinite; he says therapy is a punishment program; he says the staff is too limited to do the real job; he says the doctors work with whom they like, not those who need help (J.A. 4, 503, 506). Therapy is limited and haphazard (J.A. 4, 518, 525). Over one-third (1/3rd) of the inmate population receives little or no therapy and, believe it or not, one inmate was getting Social Security payments because he was psychotic (J.A. 4, 538).

The story, then, of Patuxent is a story of human tragedy. It is a story of an institution all dressed up in evasive, glittering language with no guides, controls or sense of direction, whose vagaries have resulted in untold numbers of individuals being incarcerated for extended periods of time with little hope of treatment[3] or hope of release.

SUMMARY OF ARGUMENT

A defective delinquent is defined under the Maryland Defective Delinquent Act as:

> "An individual who by the demonstration of persistent, aggravated, anti-social or criminal behavior evidences a propensity towards criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so far as to require such confinement and treatment when appropriate as may make it reasonably safe for society to terminate the confinement and treatment." (Article 31b, Sec. 5, Annotated Code of Maryland).

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[3]The treatment of inmates Murel and Creswell, when they most needed help was to place them naked in "meditation" cells without mattress, pad or blanket (J.A. 4, 558). This is commonly referred to as "sensory deprivation"; we prefer to call it "barbarism" (Ex. 9, p. 84).

This definition of a defective delinquent as construed by the Court of Appeals of Maryland is vague due to its uncertainty as to scope and applicability. This definition is defective in that it permits a judge or jury to punish, or withhold punishment, in their uncontrolled discretion. It fails to provide notification to potential defendants of its scope and of its reach.

Under this vague definition, a defective delinquent in Maryland is deprived of his liberty upon a preponderance of the evidence during a judicial procedure which allows the introduction of hearsay evidence of past anti-social conduct extending as far in the past as such information can be obtained. The remainder of the evidence presented by the State is almost exclusively that of State psychiatrists who testify on the basis of these unsworn reports as to the defendant's past, his propensity towards criminal activity or anti-social behavior and his tendencies toward emotional unbalance, and his actual danger to society. In this setting, evidence of treatment or its lack thereof is not admissible in the defective delinquent adjudication. It is interesting to note that though the defective delinquent has not himself raised the issue of his mental status, yet he is thrust against a wall of *ex parte* evidence surrounding the ultimate issue for adjudication. In this setting, the defective delinquent's opportunity to summon witnesses for years past is nil, thereby effectively depriving him of the right of confrontation, and since his failure to speak may be commented upon, this procedure effectively denies him the rights against self-incrimination, as well.

The majority of the decisions of the Maryland Courts, which have considered the Constitutionality of the Defective Delinquent Act, have resolved themselves into a rather simple thesis; the Act is civil in nature, its theory is therapeutic. Under this guise of the civil label, basic and elementary conventional procedural safeguards have been discarded. It is interesting to note that the defective delinquent is involved in this procedure because he has violated the criminal law, and yet, he loses his right to a speedy trial, his right under

the Constitution of Maryland to have the jury judge the law as well as the facts, his right to confront witnesses. his right to bail, and other rights guaranteed to those who are caught up in the web of the criminal justice system. And it is in this setting that the Maryland Courts have held that there is no requirement that treatment be given to one who is committed as a defective delinquent. The lack of treatment itself is virtually criminal in nature and would cry out for the elimination of the tyranny of labels which has deprived the defective delinquent of so many basic human rights. There must be some rational basis for segregating the supposed defective delinquent from the correctional population and turning his commitment from a fixed time to an undeterminate one. When treatment is not mandatory, that basis does not exist.

In this maze of labels and one-sided procedures, it matters not whether the defective delinquent's initial criminal prerequisite was a crime which was an actual danger to persons as opposed to an offense against property. The interpretation that the defective delinquent statute applies to crimes oriented against property has received approval by the Court of Appeals in Maryland. This clearly violates the Eighth Amendment's ban against cruel and unusual punishment in that one is committed to Patuxent for an indeterminate period of time and may remain at Patuxent long after his original criminal sentence would have expired. Again in this setting, civil labels and good intentions do not obviate the need for due process safeguards.

The entire investigatory procedures within the walls of the Patuxent Institution which form a preliminary to the actual Court adjudication, are completely devoid of any basic human, no less Constitutional, safeguards. The accused defective delinquent goes through a series of examinations and appears before a series of Boards without the aid of Counsel and, in fact, without any legal representation of any type or nature. This lack of due process permeates the fact-finding processes, and the adjudicative process, all of

which are critical stages on the road to defective delinquency determination.

The question then resolves itself as to whether this Court will pierce this tyranny of labels which is attached and face the realities of the situation.[4] Whether the Act is civil or criminal, whether the Act provides proper standards; whether, in fact, inmates receive treatment are matters to be determined by the realistic evidence and realistic thought and not by an artificial dichotomy of variable terms. Due process is required when the result of a judicial act is incarceration. It is the Petitioner's contention that there is no question but that they are incarcerated by a procedure which has made no room for Constitutional safeguards and guarantees and which has been, since its inception, like a chameleon changing colors depending upon the situation so as to blend into the desired result.

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[4]Interestingly enough, within the past months, the distinguished director of Patuxent, when defending his institution from a *nisi prius* decision (Circuit Court for Montgomery County, Maryland, Misc. Petition, No. 4363, *et al.*, November 18, 1971), was quoted thereby: "Boslow said yesterday that he believed Patuxent was a success." "A lot of other world experts, including [psychiatrist] Karl Menninger and [Chief Justice] Warren Burger say it is," he said; *Washington Post*, November 20, 1971. Diligent research shows, at least on the face of the record, that Dr. Menninger visited *with* Dr. Boslow *three* years before the Maryland trials for an afternoon (J.A. Md. 306) and nowhere in the reported cases can counsel find an expression of views by the learned Chief Justice. Certainly, an *ex parte* determination of "success" would be highly questionable by anyone. In addition, Dr. Menninger took pains to point out that the Boslowism of "emotionally unstable personality" is a meaningless expression (J.A. Md. 314).

ARGUMENT

I.

WHETHER THE MARYLAND DEFECTIVE DELINQUENT STATUTE IS UNCONSTITUTIONALLY VAGUE.

Procedural rights and basic constitutional liberties are accorded a generous interpretation in their favor. *Heflin v. United States*, 358 U.S. 415 (1959). It matters not whether the incarceration is based upon the label of civil or criminal; in *Re Oliver*, 333 U.S. 257 (1948). The United States Court of Appeals for the Second Circuit in the *United States, ex rel. Mignozzi v. Day*, 51 F.2d 1019 (2nd Cir. 1931), a deportation case, instructs one at page 1021, "these are consequences whose warrant we may properly scrutinize with some jealousy and insist that logic may not take the place of understanding." In a more recent case, *Costello v. Immigration and Naturalization Service*, 376 U.S. 120 (1964), and the Petitioners respectfully urge to this Honorable Court that there is little difference between deportation and the life "sentence" given at Patuxent, Justice Potter Stewart advised us at page 128:

> ". . . in this area of law involving as it may the equivalent of banishment or exile we do well to eschew technicalities and fictions and to deal instead with reality."

Reid v. Covert, 354 U.S. 1 (1957), has a teaching from *Boyd v. United States*, 116 U.S. 616 (1886), that is well to keep in mind when one examines Patuxent Institute:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form, but illegitimate and unconstitutional practices get their first footing in that way, mainly by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their effi-

> cacy and leads to gradual depreciation of the right as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for any constitutional rights of the citizen and against any stealthy encroachments thereon.".

A defective delinquent is defined by the Act, Section 5, Article 31(b), Annotated Code of Maryland, as "an individual who by the demonstration of persistent, aggravated, antisocial or criminal behavior, evidences a propensity toward criminal activity and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such confinement and treatment when appropriate as may make it reasonably safe for society to terminate the confinement and treatment."[5] We are first guided with the rule that "Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness may be from uncertainty in regard to persons within the scope of the Act or in regard to the applicable test to ascertain guilt." *Winters v. New York*, 333 U.S. 507 (1948).

In applying the test to a state statute, the statute itself, as construed by the state's highest court, is considered, and not necessarily the accusations under the statute. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939). Accordingly, if the statute is lacking in terms susceptible of objective measurement, it is unconstitutionally vague. *Baggett v. Bullitt*, 377 U.S. 360 (1964). Maryland's definition of a defective delinquent as construed by the Court of Appeals of Maryland is vague due to its uncertainty as to its scope and applicability. The definition is circular and rests ultimately on the basis of past antisocial behavior or propensity toward criminal conduct to establish a propensity tofuture antisocial behavior or criminal conduct, The Act, Section 5. *Camparella v. State*, Md. 355, 135 A.2d 311 (1957). In *Palmer v. State*, 215

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[5] All are eligible, see *The Act*, Sec. 6(a) Appendix A, page 7a and Art. 27, Section 690 Annotated Code of Maryland.

Md. 142, 137 A.2d 119, the Court of Appeals of Maryland said that the Act applied to psychopaths. Following the attack in the Fourth Circuit in the opinion in *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964), and the opinion of the trial Court in *Avey Daniels*, the Maryland Court of Appeals in *Director v. Daniels*, 243 Md. 16, 221 A.2d 397 (Md. 1966), tells us that one no longer need be a psychopath and, in fact, that it's defining a defective delinquent as a psychopath was apparently erroneous. No definition of deficiency or unbalance as construed under the Maryland law stands without necessary reference to antecedent conduct, the quantum and quality of which is undeterminable by men of common intelligence. Recourse to expert medical testimony as to the ultimate issue in an area where admittedly medical science has not developed to a station of reasonable certainty cannot save the definition. General scientific acceptance is lacking by the experts. See *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962), where psychopathic personality was found to be unconstitutionally vague as applied to a homosexual. It is respectfully urged that where doctors disagree (J.A. Md. 274) the law cannot delegate to them the delicate task of testifying to and of almost necessity determining the ultimate issue in a proceeding which leads to indeterminate confinement without maximum or minimum limits. Unlike habitual offender laws, the antecedent conduct required to brand a man a defective delinquent and incarcerate him for life need not necessarily be criminal convictions. In this respect, the Maryland definition is even broader than that of the New Jersey gangster statute struck down in *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

This Court in *Minnesota ex rel. Pearson v. Probate Court*, 209 U.S. 270 (1940), had before it a state statute providing for the civil commitment of persons with "psychopathic personality." The statute as construed and *limited* by the Minnesota Court was upheld by this Honorable Court on a finding that a person had shown a "habitual course of misconduct in sexual matters" and "an utter lack of power to control their sexual impulses" and hence was "likely to attack or otherwise inflict injury, loss or pain or other evil

on the objects of their uncontrolled and uncontrollable desire." This Honorable Court upheld this statute as construed and limited but indicated that the express language of the definition without more would have rendered the statute of doubtful validity. The questionable language defined "psychopathic personality" as follows:

> ". . . the existence in any person of such conditions and emotional instability or impulsiveness of behavior or lack of customary standards of good judgment or failure to appreciate the consequences of his acts or a combination of any such conditions as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." *Id.* at 272.

It is noted, of course, that under the Minnesota statute, the physicians were licensed, their standards of judging a sexual psychopath were different and the psychopath could petition for release at any time.

It is the Petitioners' position that any law which experiments with liberty and which can be applied with standards so loose that the Governor's Commission (J.A. 4, 509) and the American Psychiatric Association (J.A. 4, 491) find error, then this type of law is in a legal sense arbitrary and capricious, for due process as a basic fundamental of ordered liberty requires that a law not be unreasonable, arbitrary or capricious and that the means selected shall have a reasonable and substantial relation to the objects sought to be obtained. *Heflin v. United States, supra.*

The Supreme Court of Oregon in the matter of *State v. Hodges,* .457 P.2d 491, had before it a statute somewhat similar to the Maryland Defective Delinquent statute, although it was admittedly a "criminal" statute and provided for child delinquency. The statute stated:

> ". . . when a child is a delinquent child as defined by statute of this State, any person responsible for or any act encouraging, causing or contributing to the delinquency of such child, or any person who by threats, command and persuasion endeavors to

> induce any child to perform any act or follow any course of conduct which would cause it to become a delinquent child, or any person who does any act which manifestly tends to cause any child to become a delinquent child shall be punished upon conviction by a fine of not more than One Thousand Dollars ($1,000.00) or by imprisonment in a County jail for a period not exceeding one (1) year, or both . . ."

Oh, how true are the words of the Supreme Court of Oregon when it stated:

> "A law that permits a Judge or Jury to punish or withhold punishment in their uncontrolled discretion is defective as much for its uncertainty for adjudication as it is for its failure to notify the potential defendants of its scope and reach." *State v. Hodges, supra,* at 494.

As set forth in the Statement of the Case, the experts and their views, including the views of the distinguished Director of Patuxent, are such that men of ordinary intelligence cannot understand, grasp or appreciate the scope of the definition of a defective delinquent. This definition has not been saved by any controlling language by the Maryland Court of Appeals, but, in fact, the definition has been obscured by the Maryland Court of Appeals' attempts to vacate its findings in the *Palmer* case, *supra,* that the statute was meant to apply to a psychopath. This definition becomes all the more grave when the Court of Appeals of Maryland has already opined that it is not necessary that an inmate at Patuxent be given treatment. *Shields v. Director,* 244 Md. 710, 224 A.2d 107 (1966). It is the contention of the Petitioners that the definition of a defective delinquent is constitutionally sick. Is it not shocking that administratively the law is not to be followed, and presumptively the definition ignored, when economy so dictates (J.A. 4, 510)?

II.

THE PROCEDURES EMBODIED IN THE STATUTE AND IN THE TRIAL ARE APPLIED IN SUCH A MANNER AS TO OFFEND THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT AND THE CONFRONTATION REQUIREMENTS OF THE SIXTH AMENDMENT.

A defective delinquent in Maryland is deprived of his liberty upon a preponderance of evidence under a vague and novel definition. The act is understood to require the introduction of hearsay evidence of past antisocial conduct extending as far in the past as the same can be obtained. The evidence presented by the State is almost exclusively that of State psychiatrists who testify on the basis of unsworn reports as to the defective delinquent's past, his persistent and aggravated antisocial or criminal behavior, his propensity towards criminal activity or antisocial behavior, his tendency towards unbalance and his actual danger to society. The testimony of the medical witnesses is the State's case,[6] and is of necessity given weight by the courts and juries. The witness is an expert and a physician theoretically dedicated to healing the ills of mankind. Evidence of treatment, or its lack thereof, is not admissible as shown by the trial transcript in the Circuit Court for Prince George's County (J.A. 4 at 396 to 461, and see *Shields v. Director, supra.*

Anything the defective delinquent says or fails to say to the State psychiatrist or his own psychiatrist whether during examination or treatment may be used against him. See *McDonough v. Director*, 229 Md. 626, 183 A.2d 368 (1962). His failure to call his own psychiatrist may be commented upon. *Hoverter v. Director*, 231 Md. 608, 188 A.2d 296 (1963). The defective delinquent has not himself raised the issue of his mental status. *Lynch v. Overholser*, 396 U.S. 705, (1962). In essence, in a defective delinquent proceeding, counsel for the defendant is powerless against

[6]See as examples, Ex. 11, p. 6; Ex. 10, p. 6.

a sea of incompetent, rambling and remote evidence and a wall of *ex parte* evidence surrounding the ultimate issue. The act as construed and implied effectively shifts the burden of proof to the defective delinquent, who, in confinement, has the least opportunity to carry his burden.[7] He can do no leg work, his requests for information do not bear the imprimatur of officialdom, he is without funds to hire private investigators, while the State has its police machinery and that of its political subdivisions to call upon.

In this setting, the defective delinquent's opportunity to summon witnesses of years past and distances away is a hollow one. So the Petitioner's right to an independent psychiatrist is hollow, for he, as a practical matter, can do little more than base his opinion on his examination of the defective delinquent and and the extensive data compiled by the State with its limitless resources. Given the same background data as that available to the State, the opinion of the "independent" psychiatrist is but feedback of the institutional determination. His report has gone to the court for use by either side.

Under these circumstances the silence of the suspected defective delinquent in court is as damaging as silence in the Institution.[8] The proceedings have a direct tendency to require the defective delinquent, a convict, to take the stand to testify about his past conduct, including criminal and antisocial behavior.

As shown, a person suspected of defective delinquency is denied a hearing as to whether he will be aided by treatment and whether any treatment is available to him.[9]

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[7] See Ex. 13, p. 40.

[8] See *McDonough v. Director*, 229 Md. 626, 183 A.2d 368 (1962), where the Director's testimony characterized the defective delinquent as "hostile" by reason of his attempt to assert the privilege against self-incrimination. *Cf. Hoverter v. Director*, 231 Md. 608, 188 A.2d 696 (1963).

[9] *Parks v. State*, 224 Md. 643, 166 A.2d 917 (1961); *Queen v. Director*, 226 Md. 664, 174 A.2d 351 (1961); *Shields v. Director*, *supra*.

After confinement without maximum or minimum limits is imposed, the Institution administratively determines *ex parte* whether treatment is "appropriate."[10] In view of the far reaching and possibly devastating nature of the commitment, a determination as to treatment is constitutionally required. Even assuming the constitutionality of the indeterminate confinement of untreatable defective delinquents under the act, a defective delinquent who is treatable cannot obtain a determination as to that status. Thus there is no preliminary judicial determination of the very basis upon which the State asserts its power to so seriously restrict liberty. A hearing on this question is even more necessary where the State is admittedly acting in a novel and experimental area of penology.

In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), Chief Juctice Stone, in a concurring opinion, stated that the state could not sterilize habitual criminals merely upon a showing of the requisite prior offenses and a finding that sterilization would not adversely affect the criminal's health. Observing that common knowledge, experience and medical science did not establish a necessary relationship between habitual criminality and heredity, Chief Justice Stone concluded that the state could not sterilize without affording the offender an opportunity to challenge his possession of an inheritable criminal tendency, the only fact that could justify sterilization.

To argue that Maryland can confine indeterminately a treatable defective delinquent without a preliminary finding as to that fact and the availability of treatment to him, is to frankly admit that the State is imprisoning defective delinquents, possibly for life, and at the same time depriving

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[10]It should be noted that the Act's definition of a defective delinquent, before its amendment in 1957, required "confinement and treatment under an indeterminate sentence" until it was "safe for society to terminate the confinement and treatment." Laws of Maryland 1951, Ch. 476.

them of self-help and those treatment resources otherwise available in society.[11]

Skinner, supra, discusses an irreparable invasion and injury to the person. Commitment under the act, without maximum or minimum limits, is capable of subtle, far reaching and devastating injury to the mind and spirit, which cannot be repaired by any post-commitment legal proceeding.

The concurring opinion of Justice Jackson in *Skinner v. Oklahoma, supra,* at page 546, is relevant to the question of fairness. The majority of the court struck down the statute on the basis of equal protection since felons convicted of embezzlement were excluded from the statute. Justice Jackson agreed with the majority and Justice Stone's concurrence, but noted that if a careful hearing were present, the statute might not fail on equal protection grounds, taking the position that a broad assertion of state power in a novel area of penology *could possibly* be saved by *meticulous procedural safeguards.*

It is submitted that the State cannot constitutionally confine criminals suspected of defective delinquency, possibly for life, without affording them *at least* a hearing on *all* material issues with *all* safeguards and protection which the State affords those charged with crimes. See *Baxstrom v. Harold,* 383 U.S. 107 (1966). This argument does not rest upon the question of which particular safeguards of the Federal Constitution are binding upon the State in the

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[11] This argument does not necessarily contemplate the abuse or inaction on the part of institution authorities. For reasons beyond the control of the defective delinquent and the authorities, treatment may not be available. Institutional treatment is dictated by factors such as population, appropriations, facilities, personnel and the welfare of the majority of the Patuxent population. Furthermore, serious doubts exist as to the effectiveness of treatment in general. See Lindman and McIntyre, *The Mentally Disabled and the Law;* Cleckley's Chapter on "Psychopathic States" in Arieti, *American Handbook of Psychiatry,* 585.

defective delinquency determination and redetermination. Here it is contended that, in its totality, the determination proceeding in which the State applies the definition of defective delinquency as construed by the Court of Appeals of Maryland, constitutes a denial under the due process clause and the equal protection clause of the Fourteenth Amendment.

It seems unrealistic that the Director in his article, "*The Maryland Defective Delinquency Law*" (J.A. 4, 501), would state:

> "In the final analysis, we must rely quite heavily on case history criteria and on clinical impressions regarding the individual. Such impressions are not always as reasonably defended in Court as objective, standardized measures and it is hoped that such measures will be derived in the future."

Accordingly, the Director, himself, indicates that he must have substantial hearsay and that the individual must of necessity convict himself for, if he doesn't speak, as in *McDonough, supra*, he is recalcitrant and shall remain forever, and if he does speak, then he subjects himself to a lifetime of Patuxent's perhaps milieu therapy. Where the Director himself admits that his impressions are not easy to defend as objective standardized measures, and prays for guidance in the future, we are faced with the simple salient fact that under the law as written now, the act cannot be applied in an objective standard way and the individual can only hope that there will be some psychiatric breakthrough in the future which will cause his keepers to review their thinking. Again, in the article referred to, the author states that the basic difference between the sexual psychopathic statutes which have been upheld and the Maryland statute is that in the Maryland statute there is no wide background of experience or generally accepted criteria which have been tested and upheld such as in the Sexual Psychopathic Standards spoken of in the case of *Minneapolis ex rel. Pearson v. Probate Court, supra* (J.A. Md. 502). The learned Director closes his article with the interesting statement:

> "We are aware that we are moving in a region of psychiatry which has not yet been mapped out very well."

The self-incriminating factors in this case, even though "civil" in nature, stem from a criminal act from which the appellants are now incarcerated. Their *counsellors are the agents of their accusers;* therefore, it necessarily follows that their counsellors will not only be biased towards the state, the accuser, but owe a duty of full disclosure to their principal. Any statements made by a defendant will be recorded and eventually used against him even though the statement was made in confidence (doctor-patient relationship).

The federal standards of what constitutes self-incrimination are now applicable to the states through *Malloy v. Hogen*, 378 U.S. 1 (1964), which held that the Fifth Amendment exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the states. Therefore, the Fifth Amendment rights of self-incrimination are also protected by the Fourteenth Amendment against abridgment by the states. Hence the Fifth Amendment rights of self-incrimination are applicable to the states through the Fourteenth Amendment. This shift reflects the essential mainstay of our American system of justice, namely, the accusatorial approach rather than the inquisitorial.

In this case, this fundamental safeguard is abandoned and the inquisitorial system is re-established under a different label called "treatment". In *Gideon v. Wainwright*, 372 U.S. 335 (1963), it was held that provision for counsel in all criminal cases was a "fundamental right, essential to a fair trial" and this was made obligatory on the states through the Fourteenth Amendment. In the *Gideon* case, *supra*, we again dealt with a fundamental right embodied in the Fifth Amendment (self-incrimination). In each of the above cases the fundamental rights embodied in the Fifth and Sixth

Amendments were preserved through the application of the Fourteenth Amendment to the states.

In this case we have a *quasi-civil*, rather than criminal proceeding. Can we now say that the civil nature of the proceedings removes the case and individual from the scope of fundamental rights embodied in the Fifth Amendment? The answer must be "no." The rule against self-incrimination may be invoked by a bankrupt (in the absence of any statute affording him complete immunity) when being examined concerning his estate. *McCarthy v. Arndstein*, 266 U.S. 34 (1924). The *McCarthy* case, *supra* stated that:

> "... the privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it ..." 45 S. Ct., at 17.

Thus, in this case, the defendants were convicted of crimes, found to be defective delinquents by the state, examined by state doctors, who under the guise of attempting to mentally evaluate their patients and treat same, elicited and recorded facts and statements that would eventually be used against them in prolonging their sentence. If the defendants invoke their Fifth Amendment right and refuse to disclose incriminating information, then, this fact alone will be used against them and further their time at the Institution. See *McDonough v. Director, supra*. To invoke their fundamental rights goes against them with the same force as making incriminating statements concerning their past. (See also *Pointer v. Texas*, 380 U.S. 400 (1965).)

Formerly, the rule against double jeopardy existed in Maryland as a matter of common law, not as a constitutional doctrine. *Wampler v. Warden of Maryland Penitentiary*, 218 F. Supp. 876 (D.C. Md. 1963). Now it is a constitutional doctrine.

The double jeopardy factor can best be understood in the case of Samuel Daniels (J.A. 4, 388-450) by first look-

ing to his trial court finding of guilty and later sentencing. After, the finding of guilty of a "nonviolent" offense, the normal sentence that would run with the offense, a duration with limitation, was replaced with a sentence of indefinite duration. The indefinite time period, as opposed to one with maximum and minimum requirements, thus subjects an individual to being placed in double jeopardy. The burden of proof, as in a criminal case, and the burden placed on the state in the same case, becomes reversed at the determination of the finding that one is a defective delinquent. This reversal of positions is predicated upon the use of the terms "civil proceeding" and "treatment." However, in reviewing the "civil proceeding" factor we find that it stems from a criminal trial and replaces a criminal sentence; he was placed in an institution which houses criminals, bars are placed on the windows, the inhabitants of of the institution are guarded by state-paid guards, the institution is operated and run as a penal institution, but set out to the public as a place of treatment. Is this not a legal hoax?

Can we now justify this prison by hanging a meaningless hat on the word "treatment"? Can we say that incarceration at Patuxent Institution is not an actual imprisonment for the original crime for which the individual was convicted? One of the reasons society imprisons those convicted of crimes is to protect society from the so-called future re-occurrences which fall under the guise of rehabilitation. Can we say that imprisoning a man under the guise of rehabilitation is not punishment for the original act committed, when had it not been for the criminal act he would not be imprisoned? Imprisonment in any form, regardless of the label used, is still punishment. *U.S. v. Brown*, 381 U.S. 437 (1965).

Double jeopardy always attaches when an individual is exposed to punishment for a crime. Double jeopardy should not be looked upon as inapplicable just because of the "civil" nature of the case, because there is no difference

between the form of punishment rendered by the state, namely incarceration with and under the aforementioned conditions.

In *Eggleston v. State*, 209 Md. 504, 121 A.2d 698 (1956), the Court said at page 702: "the statutory emphasis is on confinement and treatment". However, in *United States v. Brown, supra*, at page 1720, the Supreme Court said: "that does not make imprisonment any the less punishment." In addition, the confrontation requirements embodied in the Sixth Amendment to the U.S. Constitution are applicable to the states by the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400 (1965).

It is the contention of these Petitioners that in addition to the unfairness of the trial procedure, it is patently unfair and contrary to the American standards of fair play and decency to confine one under an act which has as its *ratio decidendi* the right to treatment and then not give that treatment or determine whether the individual is susceptible to treatment. Persons involuntarily committed by the state to mental institutions should have a constitutional right to treatment grounded in either the prohibition against cruel and unusual punishment of the Eighth Amendment or in the due process or equal protection clauses of the Fourteenth Amendment. *United States ex rel. Schuster v. Herold*, 410 F.2d 1071 (2nd Cir. 1969). See also *Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966). In speaking of the right to treatment, the Supreme Judicial Council of Massachusetts in *Mason v. Superintendent of Bridgewater State Hospital*, 233 N.E.2d 908 (Conn. 1968), recognized that treatment must be given as has the majority of commentators in cases which have considered this aspect of involuntary incarceration in supposed mental prisons. *"Mental Illness and the Right to Treatment,"* 77 Yale Law Journal 87; Birnbaum, *"The Right to Treatment,"* 46 Am. Bar Assoc. Journal 499. Interestingly enough, the United States Court of Appeals for the Second Circuit in *Schuster, supra,* cited the opinion of the Fourth Circuit in *Sas v. Maryland*, 334 F.2d 506

(4th Cir. 1965), as standing for the proposition that treatment *must* be given, yet in the case at bar the Fourth Circuit declined to discuss this very issue, notwithstanding the fact that it was vigorously raised and the holding of the Maryland Court of Appeals in *Shields v. Director, supra*, that there is no requirement, that an inmate be given treatment unless the same is appropriate has now been engrafted on the act by the Maryland Courts. Compare *Baxtron v. Herold*, 383 U.S. 107. The Supreme Court of Pennsylvania in the matter of *Commonwealth v. Pifer*, 269 A.2d 909 (Pa. 1970), was not apparently disturbed by the civil-criminal aspect of indeterminate sentences when it held that a commitment of a prisoner for an indefinite time which would exceed the fixed maximum of his normal sentence required that the proceeding be surrounded by due process safeguards and the Pennsylvania Court felt that this was abundantly clear, considering the decision of this Honorable Court in *Specht v. Patterson*, 386 U.S. 605 (1969).

Maryland denies any right to counsel for inmates of the Patuxent Institution during the period of examination at the Institution. *Blann v. Director*, 235 Md. 661, 202 A.2d 722 (1964). In *Timmons v. Peyton*, 360 F.2d 327 (4th Cir. 1966), the Court indicated that there was no reason to assume that reputable counsel and psychiatrists could not cooperate in the administration of tests and the necessary factual investigation of the patient's background to verify or refute his own statements. The same indicia of thought was elucidated by the United States Court of Appeals for the Second Circuit in the *United States v. Driscoll*, 399 F.2d 135 (2nd Cir. 1968). Indeed in New Jersey, see *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965), that court declared that a person has an absolute right to demand the presence of his own psychiatrist during an examination conducted by a state psychiatrist.

Perhaps most closely analogous to the evidentiary problems under the Maryland law are those set forth in the Wyoming Mental Health Laws discussed by that court in

their case of *Holm v. Wyoming*, 404 P.2d 704 (Wyo. 1965), wherein the Wyoming Legislature passed a law that under mental health commitments, hearsay could be used and that the courts would not be bound by the rules of evidence. It would appear that the Maryland courts have reached the same results by implication that were reached by the Wyoming courts and have unfortunately agreed that for the good of society and perhaps, indeed, the good of the individual, the end does justify the means. The Supreme Court of Wyoming, however, had little difficulty in the matter, notwithstanding the fact that individuals were to be confined and treated for their own interests as well as society's. That court stated:

> "No matter how commendable the motives of the legislation for the mentally ill may be, it still remains a fundamental law of the land, that a person is not to be deprived of his liberty whether by involuntary hospitalization or some other kind of incarceration without due process of law."

Both Maryland and Wyoming have denied due process by relaxation of the rules of evidence. The use of extensive hearsay, which is the entire basis of a defective delinquent's commitment violates his right to due process and the commitments of all Petitioners have been based entirely on such evidence. One must not lose sight of the fact that the Petitioners are incarcerated and although stone walls cannot a prison make, nor iron bars a cage, involuntary confinement behind these walls is effectively an imprisonment as any cage, and semantics, linquistics and labels should not be used to defeat the rights of the individuals or of society which should have a valid interest in the proper confinement and vigorous treatment of persons accused of a crime who are susceptible to rehabilitative techniques. It was well stated by the United States Court of Appeals for the District of Columbia Circuit in *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

> "Congress may legislate to protect many different interests, psychic as well as aesthetic, as well as

> physical and economic, but because it may prohibit ugly billboards because they give offense, they may not lock up ugly people for the same reason. The power to control an evil does not remove all restrictions and the means that may be employed for that purpose. This principle is fundamental to the Constitutional order."

In essence, the trial procedures are a great deal like the "treatment" procedures. They are haphazard and without any objective meaning or checks and balances. *Turck v. Director*, 236 Md. 653, 205 A.2d 397 (1964).

It is therefore the respectful contention of the Petitioners that the procedures embodied in the statute and in the trial are applied in such a manner as to offend the due process requirements of the Fifth Amendment and the confrontation requirements of the Sixth Amendment.

III.

THE PROPOSED OBJECTIVES OF THE ACT ARE NOT BEING SUFFICIENTLY IMPLEMENTED TO SUPPORT ITS CHARACTERIZATION AS A CIVIL PROCEDURE AND TO JUSTIFY THE ELIMINATION OF CONVENTIONAL CRIMINAL PROCEDURE SAFEGUARDS.

Notwithstanding that the act deals only with persons who have been convicted of violation of the criminal law, virtually all actions reviewing the decisions whereby an individual is determined to be a defective delinquent have included in their opinions the bold statement that the Maryland Defective Delinquent Law is civil in nature. *Blizzard v. State*, 218 Md. 384, 147 A.2d 227 (1958); *Purks v. State*, 226 Md. 43, 171 A.2d 726 (1961); *Roberts v. Director*, 226 Md. 643, 172 A.2d 880 (1961); *McDonough v. Director*, 229 Md. 626, 183 A.2d 368 (1962); *Meredith v. Director*, 226 Md. 653, 172 A.2d 501 (1961); *Herrman v. Director*, 229 Md. 613, 182 A.2d 351 (1962); *Hall v. Director*, 245 Md. 687, 226 A.2d (1967); *Walker v. Director*, 6 Md. App. 206, 250 A.2d 900 (1969); *Director v. Daniels*, 243 Md.

16, 221 A.2d 397 (1966). By virtue of the foregoing and many other cases, the label, "civil", has been attached, and consequently, the accused defendant automatically loses conventional criminal safeguards, notwithstanding that the sole reason he is subjected to the act, and all its terrors, is because of his violation of the criminal law. He loses his right to speedy trial, *McCloskey v. Director*,230 Md. 635, 187 A.2d 833 (1963), his right, under the Constitution of Maryland to have the jury judge the law as well as the facts, *Blizzard v. State*, 218 Md. 384 147 A.2d 227 (1958), his right to confront witnesses,*Gray v. Director*, 245 Md. 80, 224 A.2d 849 (1966), his right to bail, *Bullock v. Director*, 231 Md. 629, 190 A.2d 789 (1963), and other rights guaranteed to those caught up in the web of the criminal justice system.

And yet, an individual subjected to the operation of the act is not even afforded those rights granted to civil petitioners in analogous situation. In *Mastromarino v. Director*, 224 Md. 645, 224 A.2d 674 (1966), it was stated that the act, (Article 31B, Annotated Code of Maryland) is not unlike those statutes providing for a civil inquiry into the sanity of a person. Article 59 of the Annotated Code of Maryland establishes the Mental Hygiene Law of the State of Maryland, which is applicable to the civil proceedings. Under the provisions of the act, it is interesting to note that a civil patient, pursuant to the provisions of Article 59, Section 14, has the right to bring a Writ of *Habeas Corpus* "at any time, . . .", and, subject to certain limitations as to subsequent petitions, he has the additional right to file a petition for release in the state equity courts, and is granted thereunder a right to jury trial, Art. 59, Sec. 15(a)(b)(g). This right, "civil" in nature, should be compared to the "civil" relief afforded to those who are determined to be defective delinquents. Before an inmate at Patuxent can seek review of this case, he must have been an adjudicated defective delinquent for at least two (2) years and he must have been confined for a period equal to two-thirds (2/3) of his original criminal sentence. Further, if his initial

review is unsuccessful, he has no right to seek a further review for a period of three (3) years. See Article 31B, Section 10(a), and (b). Although Article 31B, Section 10(c) reserves to an inmate his right to petition for *habeas corpus*, in essence this is a hollow right, since the rights to counsel and appointment of expert witnesses reserved under other provisions of the act for ordinary determination and redetermination hearings are not expressly reserved if an inmate seeks release by means of *habeas corpus*.

The key issue revolves around whether inmates who are committed under these "civil" proceedings, are afforded any treatment, for it would appear that the lack of treatment, itself, is virtually criminal in nature.

In an article, the *Maryland Defective Delinquent Law; an Eight Year Follow Up*, Dr. Boslow and Dr. Kohlmeyer state:

> "Court testimony is a *major and time consuming* part of the Institution's activities" (Emphasis supplied.) (J.A. 4, p. 506).

According to the Court of Appeals, the major and time consuming part of the Institution is theoretically spent in treatment and rehabilitation. It would seem that the Director has himself refuted our Court. In his article, the Director indicates that the law is applied with an uneven hand, because as he states:

> "Juries are greatly susceptible to emotional appeals and have no feeling of responsibility or further knowledge of the individual's social degradations after he is released by them as a collective body." (J.A. 4, p. 507).

The eminent Director goes on to say:

> "That the juries are most likely to release young offenders, angelic in appearance, who are able to produce their mother," (J.A. 4, p. 507).

It would appear, therefore, that the jury can have no understanding of the law. There is also disagreement among

substantial authorities, such as the reported criticism by the eminent penologist Thomas Sanford Bates, who on October 30th, 1959, submitted at the request of the Maryland Board of Corrections, his report on Patuxent with the following: (introduced as Joint Exhibits 57A and 57B). (J.A. Md. 737).

> "Whether the individual has demonstrated persistent, aggravated social behavior, whether he evidenced a propensity towards criminal activity, whether he is found to have either such intellectual deficiencies or emotional unbalance, and whether it can be clearly demonstrated that he is an actual danger to society, all are to be ascertained by the employees of the Patuxent Institution to report to the Court with a possibility of a jury trial ensuing if it is claimed.
>
> "I have never seen the words emotional unbalance used to justify the commitment of an individual for life. It is likewise unclear whether the words intellectual deficiency mean feeble-mindedness with severe mental retardation. Even Patuxent's Director who is a psychiatrist, expresses dissatisfaction with this definition; notwithstanding the fact that in the *Eggleston* case, the Court of Appeals of Maryland determined that proceedings under this act are constitutional. It seems to me that inescapable opportunities for legal action are presented whenever the Institution alleges the presence of those indefinite mental or emotional states.
>
> "This difficulty may not emerge immediately in the cases of many inmates, when they remain in confinement beyond the time their original sentence's have expired, they must inevitably be some protest. Both Dr. Boslow and I feel that a statute similar to New Jersey's would be a much safer definition and it would be less productive of litigation. The New Jersey statute limits the Institution to the custody of the individual for the maximum sentence for the particular crime, subject to the possibility of subse-

quent commitment as a psychotic or feeble-minded person."

In a letter to Mr. J.V. Bennett, Director of the Federal Prison System dated August 7th, 1959, Mr. Bates had the following comment regarding Section 5 of Article 31B, the definition of defective delinquent:

> "Included in this definition are two terms somewhat unfamiliar to the correctional field, intellectual deficiency and emotional unbalance. It would seem obvious immediately that the attempt to contrive a totally indeterminate commitment for persons described in this matter would present legal and practical difficulties, and it is my personal opinion that even with the multitudes of safeguards in the Bill that a person cannot be confined against his will under a definition as indefinite as this one." (J.A. Md. 737)

The entire thought, theory and plea behind the report prepared for Governor Tawes, dated December 17, 1964 (J.A. 4, p. 509), indicates that the select Blue Ribbon Committee, itself, is of the view that the administration of the act has plainly gotten out-of-hand in Patuxent.

Time and again our courts have struck down statutes aimed to suppress undesirable thoughts when a person who had the final authority to do the suppressing, be he censor, chief of police, etc. was one individual. Arbitrary power cannot be lodged in one person; such, however, is not the case in Patuxent.

Petitioners respectfully suggest that the manner of administration of Article 31B is so flagrantly abusive of human rights and dignity that to affix the label, "civil", and to remove the safeguards ordinarily afforded any criminal defendant has the same effect as renaming the Spanish inquisition and calling it a class picnic: you don't change an evil merely by calling it good.

IV.

THE EIGHTH AMENDMENT PROVISIONS AGAINST CRUEL AND UNUSUAL PUNISHMENT IS OFFENDED WHEN THE STATUTORY REQUIREMENT THAT A DEFECTIVE DELINQUENT BE AN "ACTUAL DANGER TO SOCIETY" IS BEING APPLIED TO OFFENSES AGAINST PROPERTY AS WELL AS VIOLENCE AGAINST PERSONS.

In *Sas v. Maryland*, 334 F.2d 506 (4th Cir. 1964) the Court of Appeals directed that in addition to such other points as might be raised in the District Court hearing contemplated, that the District Court should determine whether the interpretation and application of the statutory requirement that a defective delinquent be found to be "an actual danger to society" would violate the Eighth Amendment's prohibition against cruel and unusual punishment when applied to those individuals whose conduct indicate no more than a danger to property rights as opposed to violence to the person. Prompting this determination is the broad definition of a defective delinquent, Article 31(b), Section 5 of the Annotated Code of Maryland and Section 6(a) which lists the offenses which would subject one to a trial determination as to defective delinquent status. The interpretation of including property oriented crimes has received approval by the Court of Appeals of Maryland. *Director v. Daniels*, 243 Md. 16 at 48-49, 221 A.2d 397 (Md. 1966, *cert. den. subnom*) *Avey v. Boslow*, 385 U.S. 940 (1966).

In response to the Fourth Circuit's directions in *Sas, supra*, the District Court in its opinion *Sas, et al. v. Maryland*, 295 F. Supp. 389 (D.C. Md., 1969 at pp. 414-415) found, without determining the issue, that Patuxent only recommended commitment of those individuals whose conduct made them an actual danger to persons as opposed to property. In *Tippett v. Maryland*, 436 F.2d 1153 (4th Cir. 1971) at 1156-1157 the Court of Appeals in footnote 14 following the logic set forth by Judge Watkins, declined to determine the allegations "unless and until the evaluation policies in effect at Patuxent are changed to make operative the classification of which they complain."

Notwithstanding the alleged exclusionary classification, Petitioner Murel was confined to Patuxent in April, 1962 as a result of crimes solely committed against property. (J.A. 4, 93-97). See also, *Cowman v. State*, 220 Md. 207, 151 A.2d 903 (1959), (larceny, larceny after trust, embezzlement, and alcoholism). *Reed V. Warden*, 212 Md. 645, 129 A.2d 92 (1957) (rogue and vagabond), *Palmer v. State*, 215 Md. 142, 137 A.2d 119 (1957) (larceny and breaking and entering), and *Crews v. Director*, 245 Md. 174, 225 A.2d 436 (1967) (false pretenses).

While the basic application of the Defective Delinquent Act is determined in "civil" proceedings as opposed to "criminal" action, it was aptly noted by the Court of Appeals in *Sas, supra*, at page 516,

> "An act which deprives sane men of their liberty by confining them under severe discipline with or without treatment requires a basic fairness of procedure and substance–' implicit in the concept of ordered liberty'–to comport with the guarantees of our National Constitution."

This Court equally in Minnesota *ex rel. Pearson v. Probate Court*, 309 U.S. 270, (1940) and *In Re Winship*, 397 U.S. 358, (1970), held that "civil labels and good intentions do not themselves obviate the need for criminal due process safeguards. . . "

Since the Maryland Court of Appeals in *Director v. Daniels, supra*, has held that crimes committed solely against property as opposed to the person, provide sufficient authority to commit individuals to an indeterminate sentence in Patuxent, and this decision amounts to " . . . a ruling on a question of state law that is as binding on us as though the precise words had been written to the statute." *Terminiello v. Chicago*, 337 U.S. 1 (1949), cited with approval, *Robinson v. California*, 370 U.S. 660 (1962) the Defective Delinquent Statute, must clearly be read to include those persons in Maryland who have committed crimes against property alone. As in *Robinson, supra*, the

existence of a program of treatment is not a condition precedent or subsequent to confinement in Patuxent, *Shields v. Director*, 244 Md. 710, 224 A.2d 107 (1966) and *Director v. Daniels, supra.*

Petitioner Murel like others, whose underlying criminal involvement is directly and solely related to property, may be confined in Patuxent, without treatment, for the rest of his natural life. Even the report of the "Blue Ribbon Committee of December 17th, 1964" (J.A. Md. 509-511) specifically recommended a delineation be made between individuals who have committed offenses against property versus those who have committed offenses against persons, and set forth substantially the same rationale as did those physicians whose testimony Judge Watkins adopted. *Sas, supra,* at 415. But where, as in the case of Petitioner Murel, no treatment is required or provided, and his crimes are solely those against property, and the testimony of the Patuxent physicians notwithstanding, he still remains at Patuxent, with complete approval of the Court of Appeals of Maryland, Petitioners only protection falls within the prohibition against cruel and unusual punishment. His status cannot be determined as a footnote in an otherwise unenlightened decision. *Tippett, supra,* at page 1156-1157, footnote 14.

Murel's original sentence would have expired December 10th, 1962 had he been processed through Maryland's Penal System, though "Even one day in prision would be cruel and unusual punsihment for the crime of having the common cold," *Robinson, supra.* Realistically this Petitioner has disappeared from society with no hope of treatment. While the determination of what is cruel and unusual punishment must depend upon the actual realities of a situation, it is respectfully submitted that to the extent the Defective Delinquent Act, as expanded and approved by the Court of Appeals of Maryland, permits incarceration of those individuals who have committed crimes solely against property, to be confined for an indeterminate period can by no stretch of the judicial imagination not constitute cruel and unusual punishment within the prohibitions of the Eighth Amend-

ment. The application of Article 31B of the Annotated Code of Maryland should be held inapplicable to those persons or class of individuals whose conduct indicates solely a danger to property rights as opposed to violence to the person.

V.

THE PATUXENT INSTITUTION DOES NOT FURNISH SUFFICIENT ACTUAL TREATMENT TO DISTINGUISH ITS INMATES FROM THOSE OF OTHER PENAL INSTITUTIONS SO AS TO SATISFY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The Court of Appeals of Maryland adopted the view of the Circuit Court for Prince George's County that because the Defective Delinquent Act can be classified as civil in nature you can do just about anything you wish to do. The Petitioners suggest that it is beyond cavil that the records of the trials of Inmates Daniels (J.A. 4, 388), Creswell (Ex. 9), Tippett (Ex. 12-15), Murel (Ex. 10, 11), the testimony of Guard Levy (JA Md. 471-490), the testimony of Inmate Powers (JA Md. 553), Bressler (JA Md. 557), McDonough (JA Md. 602), Mossdale (JA Md. 599), leave it beyond peradventure that, in fact, Patuxent is nothing more than a repository for the socially undesirable, and that, in fact, if one pierces the tragic label of milieu therapy, there is no therapy at Patuxent because there is no time and no staff. The question then resolves itself into whether or not significant treatment for treatable defective delinquents must be furnished or whether the Maryland Courts can ignore the requirements of treatment for, as indicated in *Shields v. State, supra,* there is no need under the Maryland law that treatment be given unless the same is appropriate. It is the contention of the Petitioners that equal protection is sufficient to bridge the gap between the artificial labels of civil and criminal statutes engrafted by the Maryland Courts. *Smith v. Bennett,* 365 U.S. 708, (1961). *Baxstrom v. Herold, supra,* stand vigorously for the proposition that if there is a

distinction between individuals in a class that there be some relevance to the purposes for which the classification is made.

Certainly where the commitment is for the "boys' own good" (Ex. 10, p. 19) as we had in Murel, then there must be something to demonstate that it was indeed for the good of this human being, not a "boy". The distinction drawn between the Maryland Penitentiary and the Patuxent Institute is treatment, however, the treatment is so lax and devoid of results as to amount to no treatment, especially when one views the testimony of the Commissioner of Corrections that he has a greater success rate with second offenders than does the Patuxent Institute (JA. Md. 520). On the subject of treatment, the Court of Appeals of Maryland in *Director v. Daniels*, 243 Md. at 61 found all committed inmates, by virtue of the milieu therapy program are, 221 A.2d 397 in a broad sense, are receiving treatment. This is very similar to saying that all individuals who are in a hospital are receiving treatment in a broad sense, notwithstanding the fact that they rarely see their doctor except when he walks through the hall. The Courts of Maryland and, indeed, the Fourth Circuit in its learned opinion have overlooked and not amply discussed the question of treatment because of the legal proposition that treatment is not required under the Act. The position of the Petitioners is that without a finding of susceptibility of treatment and a positive finding that treatment, in fact, exists and is to be offered to the Petitioners, that Patuxert cannot be sustained. It must be remembered that the American Psychiatric Association had the following to say: (1) The Patuxent is understaffed. (2) The standard at Patuxent is housing, not treatment. (3) There is no doctor-patient relationship where the staff must commit. (4) The program is not properly medically oriented (JA 4, 491-499).

Over one-third (1/3) of the inmates are not receiving active treatment or therapy (JA 4, 518-531) and yet the Maryland Court has stated, *Director v. Daniels*, 243 Md. at 65, 221 A.2d at 446:

> "there was considerable testimony . . . which, if accepted as fact, would indicate at least lapses in the treatment program and the efficient operation of the Institution. This testimony while not wholly rejected does not show such degree of flagrancy as to have a bearing on the constitutional questions here involved . . . , however, we hope that bringing them to light will be noted by the staff for future guidance and reference."

In essence, then, the Maryland Court of Appeals has, in fact, found that there is little treatment at the Patuxent Institute, but that as a result of the hearings perhaps Patuxent will stop experimenting and will try to give treatment to the more flagrant cases which are embarrassing to the Courts in the State. This then, is what happened in the matter of Inmate Tippett, for by the time he came to a hearing before the United States District Court for the District of Maryland he was finally in speech therapy, after eleven years (JA 4 at 87). It would be impossible for counsel, or for this Court for that matter, to feel secure that the only individuals who are going to receive treatment are those who make enough fuss so that their embarrassing records become a matter of notoriety through the Courts. What in essence is the case is that Patuxent is a holding place for maximum security prisoners. Indeed, during recent penitentiary riots, the unruly were sent, of all places, to the Patuxent Institution, assumptively on the basis that the milieu therapy would ease their minds and troubled attitudes (JA 4 at 363, JA 4 at 326). Indeed, in times past, when the Institution became full they stopped having defective delinquents for a while (JA 4 at 356). All in all, it must be boiled down to one significant fact: without one man there would not be a Patuxent Institution for that one man determines whether an individual will or will not be one of the four (4) young men that are in individual active treatment (JA 4, 360) and see *Director v. Daniels*, 243 Md. at page 61, paragraph 7, 221 A.2d at 442, "Individual therapy is also provided at Patuxent on a selective basis but presently only four inmates are receiving this form of treatment, as experience there has

demonstrated that defective delinquents generally do not respond well to this form of therapy." The director has stated "economy of staff time has made group therapy the treatment of choice" (J.A. 4, 503-505). Why this was overlooked by the Maryland Court is unclear. The application of the Defective Delinquent Law changes depending upon experiences (JA 4 at 362) and whether or not one understands milieu therapy (JA 4 at 358). It is respectfully submitted that the record produced in the Courts below do not substantiate that, in fact treatment, recognizable medical treatment, is being given to petitioners and others similarly situated and that the Act cannot be sustained because of this. These petitioners are denied equal protection of the law irrespective of whether one is able to pierce the tyranny of civil-criminal labels when they are not, in fact, given recognizable medical treatment.

VI.

CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION WERE VIOLATED WHEN THE PETITIONERS WERE DENIED LEAVE TO EMPLOY INDEPENDENT PSYCHIATRIC EXPERTS AT GOVERNMENT EXPENSE.

Fundamental to the basic concept of justice and due process of law is the principle that a man's financial resources, or lack thereof, shall in no way prohibit him from gaining access to the equal protection of the laws of the land. In emphasizing this principle with relation to those involved in the criminal justice process, the United States Supreme Court has eloquently set forth "that, to interpose any financial consideration between an indigent prisoner of the State and his exercise of a State right to sue for his liberty is to deny that prisoner the equal protection of the laws." *Smith v. Bennett*, 365 U.S. 708, 709 (1961). This cherished principle, unfortunately, has been disgarded by the courts below, in the present matter.

In this case, a scrutiny of the record in the federal courts below reveals a lack of substantive and up-to-date expert testimony on the part of the Petitioners as to the appro-

priate assessment of Patuxent Institution. Similarly, after the presentation of testimony by experts on behalf of Patuxent Institution, the record reflects no expert testimony introduced by the Petitioners in rebuttal of those advocating the premise that the State of Maryland and the United States of America, and the inmates of Patuxent, are, indeed, fortunate to have access to this Institution. The record does not relfect the presentation of such expertise, because the motion of the Petitioners for leave to employ independent psychiatric witnesses at the expense of the United States was denied. (J.A. 4, 4). The Petitioners, not having financial resources to employ expert witnesses to testify in their behalf, were, therefore, clearly and blatently denied the opportunity for necessary assistance in proving their case. In essence, the Petitioners were denied a fair trial.

In *Roberts v. LaValle*, 389 U.S. 40 (1967), this Honorable Court enunciated the principle that:

> "Our decisions for more than a decade now have made clear the differences in access to instruments needed to indicate legal right, when based upon the financial situation of a defendant are repugnant to the Constitution."

The *Roberts* case involved the denial of a free transcript of a preliminary hearing to an indigent. See, also, *Draper v. Washington*, 372 U.S. 487 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1966), and *Long v. District Court of Iowa*, 385 U.S. 192 (1966).

It is respectfully submitted that it cannot be said that the right to certain typewritten pages, namely the transcript of the hearing, is any more sacred a right than the right to have the availability of experts to assist an indigent in the presentation of his case, where such expert assistance is a most fundamental aspect and requirement of the litigation at hand.

An interesting example of the perils of denying the indigent his day in court is exemplified in the case of *Bush v. Texas*, 372 U.S. 586 (1963), where the State repeatedly

rejected the Defendant's plea for the services of a psychiatrist. Not until the Defendant had been convicted and his appeal had been carried to the United States Supreme Court was there recognition that the Defendant may have been prejudiced by the State's refusal to furnish the indigent Defendant a psychiatrist. The eloquent statement of the Federal Court in *Bush, supra,* is most appropriate in relation to the discussion of the case at hand:

> "The right to counsel is meaningless if the lawyer is unable to make an effective defense because he has no funds to provide the specialized testimony which the case requires . . . . In order for Bush in the instant case to have the effective aid of counsel, it was necessary for his counsel to have the effective assistance of a qualified psychiatrist in a trial, without expert evidence as to sanity, which found him sane and resulted in a life sentence. It is so lacking in fairness as to be a denial of liberty without due process of law." Cf. *Greer v. Beto,* 379 F.2d 923 (5th Cir. 1967).

Similarly, in the present matter, the Petitioners were denied access to the specialized testimony required in their case. They were denied this access because, and only because, they had the misfortune to be in a position where they could not afford to hire qualified experts to present testimony in their behalf. Such prohibitions, it is respectfully submitted, clearly render the requirement of effective assistance of counsel meaningless and the requirement of a fair trial and due process of law meaningless, as well.

Not only were the Petitioners denied the right to assistance of qualified experts in the trial court below, because of their indigency, but the denial of expert assistance permeates the entire defective delinquent process. While the Annotated Code of Maryland, Section 7(b), Article 31(b) provides for the services of an independent psychiatrist after a determination has been made by the staff of Patuxent as to whether or not the individual involved is a defective delin-

quent there is no provision whatsoever for the affording of services of an independent expert to assist the potential defective delinquent at the preliminary stages, stages which most certainly must be characterized as critical to the defective delinquent process.

The Supreme Court of New Jersey, in the case of *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965), declared that a person has an absolute right to demand the presence of his own psychiatrist during an examination conducted by the State psychiatrist. This is certainly not provided under the present Maryland statutory scheme, and the lack of such provision denies the Petitioners a most cherished right, the right to "due process" under the Fourteenth Amendment. The distinguished United States Court of Appeals for the Fourth Circuit recently enunciated certain principles that the Petitioners respectfully suggest should have been remembered in the judicial decision making process in the present case:

> "When the State has marshalled all its forces against such creatures as the Petitioner and has convicted a man who was in law insane by denying him fair opportunity to carry his very heavy burden of proof, he has been denied due process under the Fourteenth Amendment." *Timmons v. Peyton*, 360 F.2d 327, 333 (4th Cir. 1966).

The Fourth Circuit in *Timmons, supra*, a case involving the right to counsel, quoted the eloquent dissenting words of Mr. Justice Frankfurter in *Leland v. Oregon*, 343 U.S. 790 (1951):

> "A muscular contradiction resulting in a homicide does not constitute murder. Even though a person be the immediate occasion of another's death, *he is not a deodand to be forfeited like a thing in the medieval law.* Behind a muscular contradiction resulting in another's death, there must be culpability to turn homicide into murder." (Emphasis added.)

Similarly, the Petitioners in this matter are not "deodands to be forfeited like a thing in the medieval law." Unfortunately, this has been the case to date.

The distinguished United States District Court Judge in his lengthy opinion in this matter, was most complimentary in his assessment of the testimony of the expert witnesses advocating the cause of Patuxent Institution (JA 4, 58). As in the case at the preliminary stages of the defective delinquent process, and as it was at the trial of this matter before the United States District Court, there could be no compliments for the Petitioners as to their presentation of expert testimony. The reason—the Petitioners are indigent, and they cannot afford the luxury of supporting their case with expertise. The inscription on the United States Supreme Court Building states: "Equal Justice Under Law. Justice the Guardian of Liberty." There is no question that the aforementioned phraseology cannot, at this time, be applied to the defective delinquent process of the State of Maryland, nor the judicial process afforded to the Petitioners.

It is therefore the respectful contention of the Petitioners that the constitutional rights to due process of law and equal protection of the law were denied to the Petitioners when they were denied leave to employ an independent psychiatric witness at the expense of the Government. It is respectfully requested that this Honorable Court should issue its Order declaring Article 31B of the Maryland Code unconstitutional for its failure to provide the Petitioners with the right to independent expert assistance at all stages of the proceedings, or, in the alternative, that this Honorable Court issue its Order requiring the State of Maryland to provide indigents independent psychiatric assistance from the time that the indigents are under consideration for incarceration at Patuxent Institution. Additionally, it is respectfully submitted that this Honorable Court should issue its Order requiring a new trial of this matter, and that the Petitioners be granted leave to employ an independent psychiatric witness at the expense of the government.

VII

THE PETITIONERS WERE DENIED DUE PROCESS OF LAW BY THE INITIATION OF COMMITMENT PROCEEDINGS UNDER A STATUTE THAT REQUIRES ALLEGATIONS OF MERE SUPPOSITION OR SUSPICION OF DEFECTIVE DELINQUENCY AND WHERE THAT STATUTE PERMITS A COURT ORDER TO BE ENTERED *EX PARTE* WITHOUT NOTICE OR HEARING AND WITHOUT THE ASSISTANCE OF ANY COUNSEL FOR THE ACCUSED

The statutory process for determination of defective delinquency is begun by a request made to a court that a person be examined for possible defective delinquency. Act, § 6. Section 6(b) provides that a request "may be made by the Department of Corrections or by the State's attorney or assistant State's attorney who prosecuted the person . . . on any knowledge or suspicion of the presence of defective delinquency in such person." Under Section 6(d) the request for examination is made by petition filed with the court "stating therein the reasons for suspecting or supposing the presence of defective delinquency in said person." Section 6(d) requires neither notice nor hearing, but only that the court issue a "formal written order directed to the Patuxent Institution."

Under Section 6(e), the person who is the subject of the order of examination is "retained in custody . . . until such time as the procedures . . . for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired." Thus a person whose sentence has expired must remain in Patuxent for whatever period it takes for a determination of defective delinquency. *Maryland v. Musgrove*, 241 Md. 521, 217 A.2d 247 (1966); *cf. Daugherty v. Maryland*, 355 F.2d 803 (4th Cir. 1966). See also, *Carter v. Director, Patuxent Institution*, 10 Md. App. 247, 269 A.2d 172 (1970). While it generally takes

sixty to ninety days for the examination, "lamentably, it generally takes around nine months to a year to hear the case." (J.A. Md. 669). During that period, the inmate is not eligible for individual or group therapy (J.A. Md. 414, 634-635); (J.A. 4, 206), is not removed from the receiving tier of the Institution, and apparently is not included in academic or vocational training.

A request for examination need only state "the reasons for *suspecting or supposing* the presence of defective delinquency in the said person." (emphasis added). Presumably, the court, in ordering such examination, does so on the basis of suppositions and suspicions presented. This type of a standard is too vague and too subjective to withstand constitutional scrutiny. There exists no rationale for such an abstruse and occult standard. Compare: *Terry v. Ohio*, 392 U.S. 1 (1968); *Beck v. Ohio*, 379 U.S. 89 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

The determination of the court is based largely upon an *ex parte* review of the petition. At this time there is no opportunity given to the subject to challenge the reasons given or the factual information, if in fact any exists. He is neither notified of the request nor given an opportunity to be heard. The court, when ordering the examination, need not even present its reasons for doing so. The determination is left in the court's unreviewable discretion, which, in turn, is based solely upon the allegations of mere suspicion put forth by the State. Such procedure as this, clearly runs afoul of basic constitutional principles. See: *Timmons v. Peyton*, 360 F.2d 327 (4th Cir. 1966); *Miller v. Blalock*, 356 F.2d 273 (4th Cir. 1966).

It is respectfully submitted that the order of determination "is a 'critically important' action in determining vitally important statutory rights . . ." of the person. *Kent v. United States*, 383 U.S. 541, 556 (1966). The *Kent* case involves the waiver of jurisdiction by a juvenile court to the adult criminal court of a juvenile. Juvenile waiver is analogous to commitment for examination under

the Maryland Defective Delinquent statute and that both represent the initial judicial determination of whether or not to channel the person involved through a more or less serious set of procedures. The court in the *Kent*, case, *supra*, stated:

> ". . . there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Id.* at 554.

The proceedings under Section 6 commencing commitments are of even greater "critical importance" to the persons affected than the waiver hearings in *Kent*. The failure to test the petition for examination through appropriate processes can lead to the kind of injustice, illustrated in the *Daniels* case, there it was found, after a prolonged period of confinement, that Daniels did not come within the listed categories of offenses. See *Sas v. Maryland*, 295 F. Supp. 389, 394 n. 5 (D. Md. 1969). It is also interesting to note as mentioned above, that the request for examination may be made by the Department of Corrections, the State's Attorney or Assistant State's Attorney who prosecuted the case, said person, not being a member of the medical profession, psychiatrist or psychologist, or one versed in such areas.

The looseness of these standards and procedures, are not unlike those in the case of *In Re Gault*, 387 U.S. 1, (1967), where the constitutional guaranty of due process of law was violated when a petition alleging delinquency made no reference to any factual basis for the judicial action which it initiated. Such is the case here. It is highly doubtful that any of the persons selected to be examined for commitment to the Patuxent Institution, have been chosen on any rational or non-discriminatory basis, either by the courts in their orders or by the State officials who have such wide discretion, to initiate the proceedings.

Such processes cannot be reconciled with due process of law.

VIII

PETITIONERS WERE DEPRIVED OF DUE PROCESSES OF LAW DURING THE EXAMINATION STAGE OF THEIR CONFINEMENT AT PATUXENT AND/OR IN THE FINDING BY THE INSTITUTION OF THEIR DEFECTIVE DELINQUENCY AS A RESULT OF THE PATENTLY INHERENT UNRELIABILITY OF THE FACT FINDING PROCESSES AND THE ESSENTIAL PROCEDURAL UNFAIRNESS OF ADMINISTRATIVE ADJUDICATION BY THE INSTITUTION ITSELF

The period of time of confinement at the Patuxent Institution for the purpose of "examination" and "finding" of suspected or supposed defective delinquency is a critical part of the process leading to commitment. It is during this period, that there is noticeably absent, any procedural safeguards necessary to insure "the regularity and the exercise of care implied in the phrase "due process." *In Re Gault, supra.* It is during the months, or even years of that commitment, that vital determinations and findings are made. The manner of proceeding, however, during this period, falls grossly below those minimum standards imposed by the Fourteenth Amendment in its guarantee that no person shall be deprived of liberty without due process of law.

A. The Statutory Provisions

Section 7(a) of the Act provides that "examination shall be made by at least three persons on behalf of the institution for defective delinquents . . . They shall assemble all pertinent information about the person to be examined. . . . On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent."

If three or more persons voting decide that a person is not a defective delinquent, all proceedings against him must cease.

> "If the substance of the report is that the person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency."

The staff finding of this category is final and conclusive.

If those staff personnel voting decide that the person is a defective delinquent, that judgment is forwarded to the Court:

> "They shall state their findings in a written report addressed to the court, no later than six months from the date said person was received in the Institution for examination, or before the expiration of sentence, whichever last occurs."

Under Section 8(a), this report mandates judicial proceedings.

> "If the institution in its report on any person shall state that he is a defective delinquent, the Court shall forthwith summon the person before it and advise him of the substance of the report and of the pendency of the hearing hereinafter provided. . ."

Counsel for the person and the State are given the right to have access to a copy of the report of the institution, under Section 8(b).

This report is usually the State's case, and it is interesting to note that this report, is received as evidence and may be the basis for a finding of defective delinquency, notwithstanding no opportunity for cross-examination exists. *Purks v. Maryland*, 226 Md. 43, 171 A.2d 726 (1961); *Schlatter v. Director of Patuxent Institution*, 238 Md. 132, 207 A.2d 653 (1965); *Gray v. Director of Patuxent Institution*, 245 Md. 80, 224 A.2d 879 (1966).

Considering the significance of examination and judgment by the Patuxent staff, it is remarkable that no safeguards attend the processes to insure their accuracy, reliability, and essential fairness.

B. The Fact-Finding Process

Section 7(a) of the Act, imposes upon the staff the obligation to assemble "all pertinent information about the person to be examined." The staff is directed to obtain a complete statement of the crime for which he has been sentenced, as well as the circumstances of such crime,[12] the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history."

To carry out this broad statutory mandate, the Defendant is placed in a receiving area and interviewed by a member of the Classification Committee and the Social Service Committee.

The suspected defective delinquent, is contacted and interviewed to elicit whatever information can be gotten from his early history and his developmental growth. Agencies such as the F.B.I., the courts, juvenile courts, probation departments, and all other agencies who may have had contact with the suspected defective delinquent, are contacted. (JAMD, 621-622; J.A. 4. 205, 209-210, 275).

For most persons, the search goes back into the earliest childhood for evidences of "antisocial behavior." The staff finds useful in many cases to go far back as to the time when the suspect was eight years old. (J.A. 4. 275).

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[12] It is not clear how the facts that show "a complete statement of the crime" and "the circumstances of such crime" are obtained.

The subject also goes to a battery of tests and interrogations by a psychiatrist and psychologist assigned to examine him. This series of "formal examinations" does not start until the suspect has been confined at Patuxent for a substantial time, estimated at some 40 to 45 days in most cases. (J.A. 4. 212). The total time consumed by the Patuxent staff in completing their examination is said to be 60 to 90 days. (J.A. 4. 212).

During the period of formal examination, considerable pressure is exerted upon the suspect to submit to the probings. If the person refuses to report to an assigned meeting, he is subject to punishment. (J.A. 4. 217). Even if the suspect previously declared that he does not want to speak to the doctors or take any of the examinations, he is regularly summoned. (J.A. 4. 219, 322-323). Every time there is a refusal, a disciplinary report is written on him. And as the number of refusals mounts, an ascending scale of penalties is imposed on him. (J.A. 4. 121, 220). Any person who does not submit to the interrogations and examinations, is frozen in the receiving tier of the Institution indefinitely. (J.A. 4. 217).

A case in point, is the petitioner Bradley A. Avey. Avey has been at Patuxent since November or December of 1965 and at the time of the argument in the Fourth Circuit in the United States Court of Appeals, was still on the receiving tier (J.A. 4. 68-70). Avey, acting on the advice of counsel, refused to submit to any of the doctors. (J.A. 4. 68-69). Concerning Mr. Avey, Dr. Kandel, of the Institution stated that if he persists in refusing to be examined, he will be kept indefinitely on the receiving tier (J.A. 4, 281-282). The Director of the Institution was asked whether the person could remain at Patuxent indefinitely without being classified and he responded: "Under the present state of things, yes." (J.A. 4. 311). This apparently was not the case previously for one William McDonough, at his hearing testified that he refused to submit to an examination on the ground that it vio-

lated his privilege against self-incrimination. Nevertheless, he was found to be a defective delinquent on the basis of testimony as to his "hostility." Mr. McDonough asserted his commitment to Patuxent was based solely on his "being hostile for invoking the Fifth Amendment." (JA MD, 602).

C. The Adjudicative Process

When the fact-gathering process and the "formal examinations" are completed on those suspects who corporate a conference is scheduled for the statutory members of the examination team. A staff conference is held where the staff presents their material and each person dealing with his particular area. (JA MD 622). It is interesting to note, that the subject is not present during this portion of the conference, he is given no notice whatsoever of the "fact" that will be laid before the conference for its consideration; he has no opportunity or means to discover what assertions or allegations have been incorporated into his file nor is he informed of the results of the direct examinations and probings conducted within the Institution itself. (J.A. 4. 203, 237).

It is following the reporting of the file to the assembled staff, that the subject is brought into the room for further interrogation. (J.A. Md. 622). It is at this time that "his life history" is discussed with him including the questions to elicit and to determine his past criminal record, antisocial and criminal behavior, as well as questions dealing with his intellectual level and emotional status. (J.A. Md. 622; J.A. 4. 236).

As a result of the interrogation that the staff chooses to undertake, it is sometimes confronted with conflict between the facts as stated by the person under examination and the facts submitted by one of the several outside sources from which they have come. When this happens the staff tries to find out which assertion is correct "as best we could."

(J.A. 4. 207; J.A. Md. 623-624). It is interesting to note that there are very few conflicts which the staff considers to be critical significance in making a decision on defective delinquency. (J.A. 4. 275-276). Even when they cannot resolve the conflict to their own satisfaction, the staff still proceeds to make their decisions as required under the Act and forward their finding to the Court with multiple versions of the fact. (J.A. 4. 208-209; J.A. Md. 623).

D. The Essential Unreliability and Unfairness of Process at this Critical Stage

Manifestly there is grave danger of prejudice, whether intentional or not, in these fact-finding and adjudicative processes that take place over a period of months within the private recesses of Patuxent Institution. Constitutional rights cannot be made dependent upon the benign good will that the professional staff of Patuxent may be assumed *arguendo* to have. Commitments that are potentially lifetime in duration are at stake. The power of the State is being brought to bear against an individual who may or may not realize the full extent of his jeopardy. It is not an acceptable substitute for constitutionally acceptable processes that the agents of the State may believe that, in part, they are helping the subject of their proceedings. Plainly written on the face of the statute is the purpose of incapacitating by *incarcerating* persons who "clearly demonstrate an actual danger to society so as to require such confinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment." From the standpoint of the individual, this is a proceeding of potentially enormous consequence, far beyond all but the most serious criminal prosecutions. In light of the potentialities, and the stated purpose of incarcerating for the protection of society, every significant stage of the process must comport with constitutional prescriptions of due process of law.

The fact-finding process that are undertaken at Patuxent bristle with potential unreliability. Inquiries are directed broadside to persons and agencies that may have had contact with the individual under scrutiny. A melange of responses of uncertain dubiety can be expected. The careful screening attending judicial fact-finding is wholly missing. Rumor and gossip could enter without check. Respondents motivated by ill will toward the person in question could vent their spleens against him. Worse, perhaps, completely false or partially misleading information could enter through lapses of memory or simple mistakes by respondents. Nothing in the procedures employed by the Patuxent fact-gathering protects against the gross harm to the subject that is inevitable when a dossier is compiled in secret and permanently sealed against disclosure to anyone who might challenge its contents.

The possible unreliability of responses is not confined, of course, to private persons and agencies. Official reports, based upon records about individuals, are not uniformly accurate.

Within Patuxent, there are multiple sources for unreliable data. The battery of tests administered to the person are all capable of mal-administration. Far greater dangers arise when the testing involves questions of judgment and discretion. Nothing in the procedures described during the extensive diagnostic period assures the subject against failures and mistakes. He has no professional resources of his own to which he can turn. At no point in the entire process, even at the final stage of judicial confirmation at the Patuxent finding, does the subject have a right to independent psychological testing and counseling. The provision for a "practitioner of psychiatry" in Section 7(b), whatever its value to the court proceeding, is not applicable at the critical stage of the administrators' key finding of defective delinquency.

The situation of the examinee under the defective delinquent statute is comparable to that of persons suspected of

being sexual psychopaths under the ubiquitous sexual psychopath statutes. See *The Sexual Psychopath and the Law*, in the *Mentally Disabled and the Law* 314-326 (Lindman and McIntyre ed. 1961). Sexual psychopath laws, like Maryland's defective delinquent statute, do not punish the individual for one isolated act, they require a pattern of deviation in behavior.

> "There is no requirement that this pattern be found only in police or court records; it may also be found in answers the accused makes to the court psychiatrist. Quite frequently the accused will 'confess' prior acts that never have and never will come before a criminal court. Nevertheless, these acts may be the basis for finding that the individual is a sexual psychopath. Thus in such instances, hospitalization might not rest upon the act for which the individual was accused or convicted but rather on prior unrecorded, unconfirmed acts to which the individual confesses or of which he is accused." *Id.* at 308.

The only meager check against the plethora of potential errors is the interrogation at the staff conference. The context to which the person is given any notice at all of the contents of his file is entirely within the unfettered discretion of the staff members present. To the extent that the person is allowed to learn some of the file's contents, he has neither the time nor the resources to make any real rebuttal. No possibility of his investigating the facts and producing counter evidence is afforded. Indeed, the person is not expected to produce any material at all to extract himself from his precarious situation. The staff plays with a "closed hand" which he is powerless to measure or contest. There is no one acting on the suspect's behalf present to challenge or protest allegations made or the procedures by which alleged facts were discovered.

1. *Right to Counsel During Examination*

The Court has already indicated, in circumstances not unlike the examination phase of Patuxent commitments, that the basic due process right to counsel applies. *Timmons v. Peyton*, 360 F.2d 327 (4th Cir. 1966) (en banc); *Miller v. Blalock*, 356 F.2d 273 (4th Cir. 1966); and see *Williams v. Blalock*, 280 F. Supp. 298 (W.D. Va. 1968). The Court did not hold that the accused may have his lawyer present during actual psychiatric tests,[13] but the Court did note the value of counsel representing the person throughout this critical stage: ". . . There is no reason to assume that reputable counsel and psychiatrists could not cooperate in the administration of tests and the necessary factual investigation of the patient's background to verify or refute his own statements." *Timmons v. Peyton, supra*, at 331.

The Court of Appeals for the Second Circuit has further elaborated on the value and the need for persons to have the assistance of counsel during their examinations by State psychiatrists. The Second Circuit noted that the person could consult with counsel before the examinations so that he could fully and intelligently respond to the doctor's questions. The court acknowledged that a person might give different answers if he is told of the potential use of his statements and allowed to consult his lawyer about the significance of his words, but the court would not assume that the answers would for that reason be dishonest; the court believed that they might have been more complete and more focussed on the issues to come before a tribunal thereafter. *United States v. Driscoll*, 399 F.2d 135 (2nd Cir. 1968).

Maryland denies any right to counsel to inmates of Patuxent during the period of examination in the Institution. *Blann v. Director*, 235 Md. 661, 202 A.2d 722

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[13]See also *United States v. Albright*, 338 F.2d 719 (4th Cir. 1968).

(1964). Thus, the most basic protection against unreliable fact-finding during the examination stage is absent.

2. *Right to Assistance of Experts During Examinations*

In *Timmons* and *Miller*, this Court recognized that a person needs to have resources to test the validity of the examinations and findings of the State's experts. The Supreme Court of New Jersey has declared that a person has an absolute right to demand the presence of his own psychiatrist during the examinations conducted by State psychiatrists. *New Jersey v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965). The New Jersey Supreme Court obviously believed that the presence of another expert in the examination room would not be disruptive, although that court would permit counsel for the defendant to attend only with the consent of the State psychiatrist.

Maryland, as previously indicated, does not provide for the person to have any expert counselling or assistance whatsoever during the examination processes.

3. *Right to Have Counsel Present During Staff Conference*

The right to counsel during the personal examinations of persons has not been extended to the psychiatric interview by this court, presumably because of the possibility of disturbing that delicate process. However, there is no similar reason for preventing a defendant from having his attorney present at the entire staff conference proceedings that lead to the adjudication by the Institution. See, on this point, the illuminating discussion by the Court of Appeals for the District of Columbia Circuit. *Thornton v. Corcoran*, 407 F.2d 695 (D.C. Cir. 1969). "A lawyer is undeniably a 'third party' to the doctor-patient relationship. As such, physicians may feel he is a fatally disruptive influence. But the staff conference is hardly as private and as individualized an encounter. The individual

under examination faces a number of staff members, most of whom he has never seen before. The argument that a lawyer will prove a fatally disruptive influence at such a hearing is not compelling." *Id.* at 701. Compare the constitutional guarantee of the right of presence of a defense attorney at lineups. *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967).

E. Subsequent Judicial Proceeding not Curative

The Defective Delinquent Act contains provision for a judicial hearing following the examination and finding stages. Under Section 8, various procedural requirements are established for the conduct of that hearing in court. The Act speaks with much greater depth to the manner of judicial hearing than it does to the manner of the examination and finding that take place behind the walls at Patuxent. The contention may be anticipated, therefore, that the subsequent judicial hearing provides the constitutionally necessary inquiry that is fair and reliable. Thus, it may be said, even if the Patuxent stage of the proceedings lacks the essential requisites of verity and due process, the harm is cured by the judicial proceeding to follow.

We believe that this argument of a curative judicial proceeding is invalid. First, the judicial proceeding is itself assailable on multiple grounds as constitutionally flawed. To some extent this is now manifest on the face of the statute; to some extent it is the product of the interpretations that the Maryland courts have made of the Act. As will be developed in the subsequent section of this brief, the judicial hearing is now but a weak echo of conclusions already reached at Patuxent.

Second, and more basically, the proceedings during examination and finding at Patuxent should be required to meet constitutional norms even if there might follow a judicial hearing that did not itself violate the Constitution. The Patuxent processes are critical stages. A staff finding of

non-defective delinquency legally forecloses further prosecution toward commitment. A collective judgment is made at this point with great consequences to the person involved. Moreover, whether one looks at this collective staff conference or at the earlier "personal examinations" it is necessarily true that the conclusions reached by the professional experts will derive from an accumulating pastiche of data of varying credibility, authenticity and origin. Once that professional assessment is made, it is quite impossible for the expert, or a third party, to retrace all the inputs that have affected the conclusion.

If and when the staff members later testify in court, they will be in the position of justifying and rationalizing a conclusion previously reached and formally reported. They cannot wash their minds of inadmissible data. Inevitably, the conclusions of these experts will carry a heavy weight in the judicial proceedings. In the Maryland courts, their conclusions are treated with extraordinary deference. It is vital, therefore, to assure that the original impressions and conclusions will be formed by constitutionally acceptable means.

Thus, we submit that the constitutional errors that infect the proceedings during the examinations and findings cannot be and are not legally curable.

IX

PETITIONERS' RIGHTS AGAINST SELF-INCRIMINATION ARE VIOLATED BY THE UNYIELDING COMPULSION UPON PERSONS SENT TO PATUXENT FOR EXAMINATION TO SUBMIT TO IN-DEPTH INTERROGATION AND TESTING IN THE TOTAL ABSENCE OF PROCEDURAL SAFEGUARDS

The Petitioners contend that the compulsion asserted against persons sent to Patuxent to submit to examinations against their wills violates the Fifth/Fourteenth Amendment right against self-incrimination. Even assuming, *arguendo*, that the information which the Patuxent

staff extracted from the persons referred for examination was completely reliable yet nevertheless, the "suction process" by which it is obtained is unconstitutional.

The Director and Associate Director of the Institution both testified that in depth examinations of all persons sent to Patuxent are a *sine qua non* of a determination by the staff that they are or are not defective delinquents. It was their view that it was absolutely impossible to diagnose defective delinquency without such examinations. (J.A. 4, 223, 310). We have previously mentioned that when a person has been referred to Patuxent and refuses to submit to such examinations, he is "frozen" indefinitely on the receiving ward of the Institution. (J.A. 4, 68-70, 281-282, 311).

When an inmate fails to resist, or his resistance is finally broken, he is interrogated in depth. The Social Service people attempt to "elicit whatever information can be gotten from the patient's early history, (and) his developmental growth. . ." (J.A. Md. 621). Formal examinations are conducted by a psychiatrist, a psychologist and a physician, pursuant to Section 7(a) of the Act. The statute directs these officials to assemble all pertinent information about the individual that might show "persistent aggravated antisocial *or* criminal behavior." Act, § 5 (emphasis supplied). It should be noted that the statute does not confine the inquiry to behavior in violation of penal laws, but in fact, all antisocial behavior is pertinent. Within the ambit of criminal behavior, it is not necessary that all incidents appear on record as convictions, or even arrests, and the examiners are directed to include "a complete statement of the crime for which he has been sentenced, (and) the circumstances of such crime." Act § 7(a). Maryland Court of Appeals has declared that this "personal examination" is legally compulsory on the examiners. They could not eliminate it if they wished. *Maryland v. Musgrove* 241 Md. 521, 217 A.2d 247 (1966). As mentioned before, after all of the above examinations, the

subject is examined again in his personal appearance before the staff conference.

The personal appearance before the staff conference is treated as essential to the finding by the Institution. When the subject is brought before the staff, "his life history is discussed with him in longitudinal details." (J.A. Md. 622). Those matters which are inquired into are basically as follows:

> "[T]here are a series of questions to elicit and to determine the past criminal record, antisocial and criminal behavior of the individual. There would then be another series of questions dealing with the intellectual level and emotional status of the individual and any such questions as seemed appropriate that might help us (the staff) determine whether he is a potential danger to the community." (J.A. 4, 236). "Yes, when we talk to the patient we go over the material with him and discuss his difficulties in the community. If he was a child, his truancy, his antisocial behavior, his conflict with authorities, *all the details we can possibly get into.*" (J.A. Md. 622) (emphasis supplied).

This Court has declared that the Fifth Amendment privilege against self-incrimination is fully applicable to State proceedings. *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964). The privilege applies where the proceeding is labeled "criminal" or "civil."

> "The language of the Fifth Amendment, applicable to the states by operation of the Fourteenth Amendment, is unequivocal and without exception and the scope of the privilege is comprehensive." Application of Gault, 387 U.S. 1, 47 (1967).

The Maryland courts and the courts below committed a fundamental error in failing to recognize the violation of the Fifth Amendment that is patent in the compulsory examination of inmates at Patuxent. The District Court said that the purpose of the compulsory interrogation was

not to gain evidence to prove the subject has committed a crime, but rather to discover the inmates mental condition. *Sas v. Maryland* 295 F. Supp. 389 at 411. The lower courts, did not recognize that the awful impact of incrimination occurs entirely within the pending proceeding to incarcerate the person potentially for the rest of his life. The suction process draws out of the mouths and minds of persons under examination the basis for their own doom, "all the details we can possibly get into." In essence, the subject is made the architect of the destruction of his own liberty, and he himself builds the walls within which he is confined. It is no answer to say that the defective delinquency proceedings are "civil" rather than "criminal". For as *Gault, supra* declares, the Constitution is not to be evaded by labels.

It is also contended that the compulsory examinations of the Institution are unexcused and unmitigated violations of the Fifth Amendment. The only limits on the extent of inquiry are those self-imposed by the inquisitors. Nothing is done to inform the subjects of the examinations that there are any restrictions upon the investigation. Needless to say, nothing is done to assure that there will not be any overreaching in the interrogations as they occur.

The principle we are discussing here is analogous to the problems of incustody interrogation of criminal defendants. This Court has established a series of procedural safeguards to insure that the privilege against self-incrimination would not be lost through lack of awareness of this privilege, or through lack of real understanding and intelligent exercise of it. The right to have counsel present at the interrogation was held to be indispensible in the protection of the Fifth Amendment. See also *Orozco v. Texas,* 394 U.S. 324 (1969), where the Court held that use of admissions obtained from an interrogation of an accused at his lodging at 4 a.m., in absence of the *Miranda* warnings, was a violation of the Self-Incrimination Clause.

The record in this case indicates that no systematic effort is made to adivse the inmates of the right against self-incrimination or their right to remain silent. (J.A. 4, 240-241). In fact, this was best summed up by Dr. Kandel when he stated: "We don't give any inmate any warnings of any sort." (J.A. 4, 243) In addition, the examiners do not advise their subjects that they will repeat later what the subjects disclose even though it is cloaked with the apparent confidence of a doctor-patient relationship. (J.A. 4, 279-280).

Under the Act, an inmate does not even have the right to have counsel during this critical stage of the proceedings against him. *Blann v. Director*, 235 Md. 661, 202 A.2d 722 (1964). The right to counsel only begins at the judicial stage, after the harm has been accomplished. Act, § 8(b). Much has been written recently regarding the need for counsel at sanity hearings and that it, in fact, is founded on the Constitution. Note, *Right to Counsel at the Pretrial Mental Examination of an Accused*, 118 U. PA. L. REV. 448 (1970).

The violations of the Fifth Amendment, that occur at the examination and fact finding stages cannot be cleansed by the subsequent judicial hearing.

It should be noted that the self-incrimination argument advanced here relates to the evils inherent in the compulsion over and above the evils that may flow from the use to which the product of compulsion may be put. The extreme nature of the compulsion applied to persons confined for examination at Patuxent is so egregious that it must stand on its own footing as depriving persons of their constitutional rights. The resisting inmate, who refuses to disclose the information that might lead to his diagnosis as a defective delinquent, is frozen in custody for an indeterminate time. Potentially, he could remain in that status for the rest of his life. Such an inmate will never get to a judicial hearing where the product of his compelled examination can be filtered out; and of course, if he speaks

and discloses all to the staff of Patuxent, he builds his own enclosure.

Such abuses have been tolerated in the past, but should not and cannot be tolerated in the future. It is vehemently urged to this most distinguished Court that *the future is now!*

X

PETITIONERS' RIGHTS TO CONFRONT AND EXAMINE WITNESSES AGAINST THEM IN A JUDICIAL HEARING FOR DETERMINATION OF THEIR DEFECTIVE DELINQUENCY ARE INADEQUATELY PRESERVED BY THE STATUTORY SCHEME OF DEFECTIVE DELINQUENT PROCEEDINGS.

The Maryland courts have held that the written report from the Institution prepared by the staff at Patuxent [Act, Sec. 7 (a)] is admissible in evidence at the commitment hearing. The regular procedure in judicial hearings is for a member of the Patuxent staff to read the report, which contains the work and conclusions of other staff members as well as other information which no member has first hand knowledge. The director usually appears for the staff but it has been held that

> "No particular procedure is provided by the statute (Art. 31B) for admitting the report into evidence nor is there any requirement that either the director or examining psychiatrist testify at the hearing."

Mastromarino v. Director, 244 Md. 645, 224 A.2d 674 (1966). As mentioned before, not only the Patuxent reports considered admissible hearsay, but they alone are sufficient to support a finding of the subject of the hearing of the defective delinquent. *Johns v. Director*, 239 Md. 411, 211 A.2d 751 (1965).

The report of the Patuxent Institution is not the only hearsay evidence which is admissible at the commitment hearing. Also admissible, are the past record of contact

with the courts, with law enforcement agencies, including records of arrests, juvenile offenses, and convictions wherein the subject had not been represented by counsel are also admissible whether or not they are included in the Patuxent report. *Walker v. Director*, 6 Md. App. 206, 258 A.2d 900 (1969); *Specht v. Director*, 243 Md. 734, 223 A.2d 263 (1966).

In the case of *Pointer v. Texas*, 380 U.S. 400 (1965), the court at page 403 stated that the Sixth Amendment right of an accused "be confronted with the witnesses against him" is a "fundamental right . . . made obligatory on the States by the Fourteenth Amendment." This Court in *Pointer, supra*, also stated "the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." The admission of the Patuxent report into evidence, violates the spirit and the meaning of the Sixth Amendment of the United States Constitution.

Maryland Courts have once again engaged in a tyranny of labels, to uphold the denial of those basic rights mentioned above. This is done, by classifying the defective delinquent procedure "civil". However, as stated previously in *Gault, supra*, such a demonstration is meaningless; it is the potential consequences of the proceeding which determine whether basic due process protections. Certainly the potential consequence of life-time commitment cannot be distinquished from temporary confinement of juveniles. The commitment hearings under the Defective Delinquent Act whether labeled civil or criminal is very similar to that under sexual psychopathic laws. This Court has consistently held that under a typical sexual psychopathic law the hearing must afford the subject basic due process protections. *Specht v. Patterson*, 386 U.S. 605 (1967); see also: *Gerchman v. Maroney*, 355 F.2d 302 (3d Cir. 1966).

Confrontation is a trial right. Even whether the defendant has had a previous opportunity to cross-examination and has actually cross-examined a witness, it is still incum-

bent upon the State to produce that witness again, if reasonably possible. *Barber v. Page*, 390 U.S. 719 (1968); *Britton v. Maryland*, 298 F.Supp. 641 (D.M.D. 1969). As this Court stated in *Barber, supra*, at page 725:

> "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witnesses."

In light of all of the above, it can certainly be seen that the petitioners could not possibly have been guaranteed these rights, on a piece of paper of which they were the writers, as deprived them of their liberty.

XI

THE STANDARD OF "CLEAR AND CONVINCING EVIDENCE" OR "BEYOND A REASONABLE DOUBT" SHOULD HAVE BEEN USED BY THE MARYLAND COURTS AT THE COMMITMENT PROCEEDINGS, RATHER THAN THE STANDARD OF "PREPONDERANCE OF THE EVIDENCE"

The Defective Delinquent Act does not provide a standard for determining the burden of proof that the State must meet in order to commit a person to Patuxent for an indeterminate period. The Maryland courts in applying the label "civil" have used the standard of a fair preponderance of the evidence. This is illustrated in the record by the instructions to the jury in the *Daniels* case, (J.A. 4, 465). This charge has been approved for many years by the Maryland Court of Appeals. *Crews v. Director*, 245 Md. 173, 225 A.2d 436 (1967); *Purks v. Maryland*, 226 Md. 43, 171 A.2d 726 (1961). This Court has held that the standard of proof "beyond a reasonable doubt" must be applied to determinations of delinquency in juvenile proceedings, in re *Winship*, 397 U.S. 358 (1970). This Court in that case stated that if a person accused of a crime could be adjudged guilty and imprisoned on the strength of the

same evidences that would suffice in a civil case, it would amount to a lack of fundamental fairness. Certainly, here, by the use of a label, the Maryland courts have attempted to change reality, but they can not change the fact that the petitioners have been deprived of their liberty. It is therefore contended, that the Maryland Courts will fight an unconstitutional standard in every judicial commitment made under the Act.

XII

PETITIONERS WERE UNCONSTITUTIONALLY REQUIRED TO INCRIMINATE THEMSELVES BY THE STATUTORY PROCEDURES FOR REVIEW AND REEXAMINATION OF THEIR COMMITMENTS

Section 13(b) of the Act provides that there shall be annual review and reexamination of each committed inmate by the Institution's Board of Review. If the Board of Review finds against the inmate, a written recommendation so indicating is filed with the records of the Institution. The reexamination process by the Board of Review is the only procedure for getting out of Patuxent during much of an inmate's confinement. There is only a very restrictive right to seek discharge through the Courts. The first time an inmate is eligible to petition a court is at the conclusion of two-thirds of his original sentence [Act. Sec. 10(a)]. It is interesting also to note that under Sec. 10(b) of the Act after each exercise of the power to have the Court review his status, an inmate must wait three (3) years to file another petition. Therefore, in theory at least the most available process for terminating confinement at Patuxent Institution is the annual reexamination by the Board of Review.

Suffice it to say the constitutional defects that permeate the original commitment process all survive to similarly afflict the determinations of the Board of Review. The flawed record compiled by the Institution for the purpose of committing the inmate, is its permanent file which the Board of Review has for its use.

This record of course is supplemented with entries made during the period of confinement at the Institution. The Board also receives reports about the inmates' work record and general behavior from all echelons, including his disciplinary record (J.A. 4, 278).

An inmate is powerless to present any expert evidence of his own to the Board of Review. There is also a firm Institutional policy that forbids inmates, even those with requisite financial means, from having their own psychiatrists come in and treat them. This has been justified by Dr. Kandel, the Associate Director, on the ground that this would interfere with the presentation of material to the Board of Review. Dr. Kandel indicated that if outsiders were allowed to come in and to report their findings the Board would be compelled to accept the word of outsiders without knowing what was actually happening in therapy (J.A. 4, 292-293).

The material submitted to the Board of Review by the Patuxent staff is to a very large extent the produce of compelled disclosures from the inmates (J.A. Md. 226-228, 293, 384, 454-455, 629). Noteworthy is the fact, that many of the distinguished experts who testified in the trial court concerning the soundness of an institution like Patuxent expressed concern about the breach of confidence between the therapist and the inmate. Dr. Manfred Guttmacher stated that it would be better not to have the inmate present when his psychiatrist was testifying against him (J.A. Md. 239). Dr. Jerome D. Frank, Professor of Psychiatry at Johns Hopkins University, acknowledges that there exists a problem when a therapist must testify on the question whether his patient is to get an indeterminate sentence (J.A. Md. 397).

The evidence preponderates that there is no standard or practice of respecting inmates' confidences on the date that the professional staff presents to the Board of Review. The Professional staff would surely be less chary of communicating their knowledge to the Board of Review than to

a court, since the subject is not present when the data is given and never has any opportunity to discover its content.

It is submitted that the processes employed in compiling information for the annual reviews by the Board of Review, the manner of its presentation to the Board, the absence of any semblance of notice and opportunity to be heard, and the inherent self-incriminatory practices render the proceedings before the Board of Review violative of the Constitution.

XIII

THE DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT ERRED IN FINDING THAT THE MARYLAND ACT IS CONSTITUTIONAL ON ITS FACE, INTERPRETATION, APPLICATION, ADMINISTRATION AND RESULT

The Honorable R. Dorsey Watkins in his decision in *Sas et al. v. State of Maryland* (J.A. 4, 5), finds that the Maryland Defective Delinquent Statute (Art. 31 (B), Annotated Code of Maryland, 1957) is constitutional on its face. This fails to take into consideration the fact that while the face may be beautiful, yet the same may not be true for the mind and the body. Such is the case with Patuxent, a beautiful label, but nothing more.

The District Court's opinion goes on to say: "This Court feels that the *Fourth Circuit's concern* (which was not and is not shared by the writer) is fully overcome . . .", (J.A. 4, 13).

The first concern of the Fourth Circuit should have rightly been the question of whether the Maryland Act is civil or criminal in nature. This is important because the nature of the Act determines the rights, and constitutional guarantees which should be present and afforded to all the Petitioners in this case. The Court, in *Director v. Daniels*, 243 Md. 16, 221 A.2d 397 (1966), stated:

> "We further point out that the purpose of this act is so closely akin to the so-called 'sexual psychopath' laws enforced in some twenty (20) States and the District of Columbia, that the decisions of the Courts in those jurisdictions that each of their laws is civil in nature is ample authority to conclude that the Maryland Act is regulatory" (J.A. 4, 24).

In interpreting the Maryland Act regulatory and civil, the District Court and the United States Court of Appeals for the Fourth Circuit failed to consider the test which the Supreme Court has laid down in order to determine whether or not an Act is civil or criminal. The usual tests are whether the sanction involves an affirmative disability or restrain, whether its operation will promote judicial aims of punishment, retribution and occurrence, whether the behavior to which it applies is already a crime and whether it appears to be excessive in relation to the alternative purpose assigned. See: *Kennedy v. Mandosa Martineze*, 372 U.S. 144.

Certainly no one could argue that the indeterminate sentence provision of the Maryland Defective Delinquent Act does not create a total restraint that involves an affirmative disability. Nor could one argue that the Act does not promote deterrence and finally, the petitioners stringently suggest that the Act is excessive in relation to the alternative purpose assigned. It is not enough to accept the Act as civil on the basis of the Maryland Court's determination. The Federal Judiciary owed an affirmative duty to the Petitioners to have considered the various tests laid down by the Supreme Court of the United States to determine whether the Act is civil or criminal, regulatory or penal.

The lower Court went on to conclude that it would seem proper for the person who was being considered for Patuxent to be required to undergo a psychiatric examination which would not affect commitment, but might result in the Patuxent staff finding that the person was not a defective delinquent or in the alternative lead to a trial to determine, as the Court put it, not the guilt or innocence of a

crime, but the proper disposition of a person already convicted of a crime (J.A. 4, 38). This, it is contended, fails to take into consideration the language in *Specht v. Patterson*, 386 U.S. 605 (1967) where the Court in construing the Sex Offenders Act of Colorado stated as follows:

> "The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under the Act to determine whether a person constitutes a threat of bodily harm to the public, or is a habitual offender and mentally ill. *That is, a new finding of fact that was not an ingredient of the offense charged. The punishment under the Second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm*" 18 L.Ed.2d at 329 (Emphasis added)

With all due deference to the District Court and the Fourth Circuit, they failed to take into consideration the fact that once a person is alleged to be a defective delinquent and is incarcerated at the Patuxent Institution, he is, in fact, in the grasp of preventive detention. Preventive detention raises serious constitutional questions, questions which neither the District Court nor the Fourth Circuit not only did not reconcile, but did not find important enough to mention. The United States Court of Appeals for the District of Columbia Circuit in the case of *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969), in construing the Sexual Psychopaths Act of the District of Columbia, turned its attention to the question of preventative detention as a necessary issue to be determined in construing this kind of act. The Court stated emphatically that:

> "It may be that in some circumstances preventive detention is in fact permissible. If so, such detention would have to be based on a record that clearly documented a high probability of serious harm, and circumscribed by *procedural protection, as comprehensive as those afforded criminal suspects*. Detention for any significant period of time would have

> to be attended by periodic "review as well as continuing assurance of *bona fide efforts at treatment* suited to the particular individual detained." (Emphasis added). *Id.*

Our attention was therefore, by necessity, turned to the question of whether or not the Act was civil or criminal. The United States District Court for the District of Columbia is saying, that this is immaterial, in that when preventive detention is the outcome (as in the Maryland Act, where an indeterminate sentence is involved), the individual would have to be "circumscribed by procedural protection as comprehensive as those accorded criminal suspects." This should be added to the statement of the United States Court of Appeals in *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968), where the Court at page 647 states:

> "and we also included that 'while prior criminal conduct is a relevant consideration for determining the conditions of custodial care, it does not provide an automatic basis for allowing significant and arbitrary differences in such conditions.'"

By necessity, our attention is turned to the question of "bona fide efforts at treatment". This, the Petitioners contend, is not the case in their situations. Can it be a "bona fide effort at treatment", when for example, the Petitioner George Lewis Creswell had been seen by the Institutional Psychiatrist once in 1962, once in 1963, once in 1964 and five times in 1965 (Ex. 9, p. 44), and add to this the fact that the doctor conceded that each visit did not even take a couple of hours? (Ex. 9, p. 44) Can the mandate of "bona fide treatment" be squared with the Maryland Court's decision in *Shields v. Director*, 244 Md. 710, 224 A.2d 107 (1966), where the Court stated "finally, appellant's fourth contention is without merit since there is no requirement that an inmate be given treatment unless the same is appropriate." *Id.* at 109.

To hold the Maryland Act, constitutional on its face, is to disregard the constitutional questions that flow under the

surface. What possible justification can there be (and we might parenthetically note that the District Court did not see fit to pass upon this question) when the State of Maryland is segregating certain "lawbreakers" and putting them into an institution at the mercy of an indeterminate commitment, because they evidence antisocial behavior, when statistics show that 70 to 75% of the people in the penitentiary are repeaters and sociopaths (J.A. Md. 521).

The District Court found that there is no resort to punitive measures when a person referred for an examination refused to answer questions would not submit to such an examination. In the case of the Petitioner Avey, the record shows that he refused to speak to the psychiatrist (J.A. 4, 347). The record discloses that this failure could be directly related to his, or any inmates, remaining in the Patuxent Institution for an indefinite period of time (J.A. 4, 347). In this situation, the inmate of Patuxent sits under a sword of Damocles. He is like the character in the story of *The Lady and the Tiger*, he does not know which door to choose. If he speaks to his psychiatrist, he may give them reason to believe he is a defective delinquent, and if he does not speak to them, he may remain in Patuxent forever. We must add to this the problem of an inmate who wants to have his own private psychiatrist examine him.

In the situation where the inmate or candidate for Patuxent wishes to have an independent examination, he is met with Dr. Boslow's theory of Patuxent as enunciated in a letter written by the eminent doctor which is quoted in the District Court's opinion (J.A. 4, 56). The doctor states:

> "Thank you for your letter of September 24th, 1964, inquiring whether the policies of this Institution permits the treatment of inmates on a private basis by a psychiatrist not connected with the Institution.
>
> I have given the question careful consideration, and although I am myself of the view that this ought not be permitted, I submitted the question

to our Board at a recent meeting. They were also of the view that this should not be permitted."

This puts the inmate in the position of having the evaluation of a State psychiatrist on a "take it or leave it" basis. It is well known in medical science, that doctors disagree. This especially true in the area of mental health and mental illness. This would be even truer, in the case where some of the inmates may not even be mentally ill, but, are sent to Patuxent when no rational basis as shown above exists.

The District Court treats the question of the differentiation between those who commit crimes against persons then those who commit crimes against property in a somewhat cavalier manner. The Court states that "moreover, a property offense—a breach of the law—can easily lead to willingness to break another law—an offense to the person" (J.A. 4, 47). This statement would seem to say that because a person might steal a loaf of bread, he may, because stealing a loaf of bread is a crime, commit murder. This is ludicrous to say the least. It bysteps the question of crimes against persons versus crimes against property; a topic that was specifically brought up by the *Blue Ribbon Committee* of December 17th, 1964 (J.A. 4, 509), where it was indicated that a delineation should be made between individuals who have committed offenses against property versus those who have committed offenses against persons.

While the District Court and the United States Court of Appeals for the Fourth Circuit may hold that the Maryland Act is constitutional on its face (J.A. 4, 58), the Petitioners submit that the body is in dire need of surgery.

CONCLUSION

The Patuxent Institution is neither a prison, a hospital nor an insane asylum. Yet the fact remains that one is, indeed, imprisoned. The act of incarceration under the Act is capable of changing in form, depending upon the attack upon it. The defective delinquent attempting to assert rights and protections afforded all citizens by the Constitution of the United States can be fairly compared to Odysseus confronted with Proteus; when the defective delinquent escapes, Patuxent is a prison; when he complains of indeterminate confinement, possibly even in a penitentiary without maximum or minimum limitations, Patuxent is a hospital or an insane asylum; or the Act is analogized to habitual criminal offender law. When the defective delinquent requests those protections surrounding criminal prosecutions and imprisonment, the Act is civil; when the delinquent complains of cruel and unusual punishment, he is told that he is being treated though the Maryland Court has held treatment is not required. When the defective delinquent offers evidence at a determination or redetermination hearing regarding treatment, he finally learns that the issue is not relevant, and that he is truly confined for the protection of society.

Accordingly, this Court should direct the District Court to issue the Writs after finding that the Petitioners have been confined in an institution which grants no treatment and whose commitment procedures are patently not Constitutional. Alternatively, this Court should grant the Legislature of Maryland a brief period of time to formulate appropriate procedures consistent with the principles of due process to include (1) a more objective definition susceptible of measurement and understanding; (2) the right to counsel beginning with the examination order stage and to confront witnesses, not only at the introductory stage, but also at redetermination and Board of review hearings; the right of medical assistance at the adjudicatory stage in the institution prior to the institution's findings; (3) the providing of appropriate standards for the introduction of evidence

and burdens of proof; (4) the granting to the suspected defective delinquent of the absolute right of appeal, and (5) the insuring that the institution has the capabilities of giving treatment and that committed defective delinquents are susceptible to treatment, and, in fact, duly receive appropriate and proper medical treatment.

Respectfully,

KARL G. FEISSNER
WILLIAM L. KAPLAN
THOMAS P. SMITH
FRED R. JOSEPH
ANDREW E. GREENWALD
WALTER B. LAAKE, JR.
Attorneys for Appellants
FEISSNER, KAPLAN & SMITH
6401 New Hampshire Avenue
Hyattsville, Maryland 20783
270-2626

APPENDIX A

ARTICLE 31B
DEFECTIVE DELINQUENTS

* * * * *

PATUXENT INSTITUTION

§ 1. Established; board of Patuxent Institution.

(a) *Institution established.*—There shall be an institution for defective deliquents, with the powers and duties as provided in this article or elsewhere in the laws of this State. Said institution shall be established at Jessups and shall be known as the Patuxent Institution.

(b) *Board of Patuxent Institution—Powers generally; membership; appointment; terms; vacancy; removal of members; compensation.*—The board of Patuxent Institution shall possess all of the powers bestowed by law upon Patuxent Institution and shall consist of the chairman of the board and four associate members, who shall be appointed by the Governor with the advice and consent of the Senate. Two of the associate members shall be appointed from the membership of the advisory board of Patuxent Institution, and one of these two associate members shall be a psychiatrist. The chairman and associate members of the board shall serve terms of four years, except that the initial term of the associate members first appointed to the board shall be one, two, three and four years respectively. Any vacancy in the board shall be filled by appointment of the Governor, with advice and consent of the Senate, for the unexpired term. The Governor may remove any member of the board for inefficiency, neglect of duty, or misconduct in office, giving to such member a copy of the charges preferred and the opportunity of being first publicly heard in person or by counsel. If such member shall be removed, the Governor shall file in the office of the Secretary of State a complete statement of all charges made against such member,

and his finding thereof, together with a complete record of the proceedings. The chairman and associate members shall serve without pay.

(c) *Same—Oath; certificate of appointment.*—Before entering upon the discharge of the duties of his office, each member of said board shall take an oath that he will well and faithfully execute and perform all and singular the duties appertaining to his office according to the laws of the State and the rules and regulations adopted in accordance therewith. The certificate of the appointment by the Governor of any member shall be sent to the clerk of the circuit court of the county or the clerk of the Superior Court of Baltimore City, as the case may be, where the appointee of the receipt of such certificate warning him that failure to take the aforesaid oath within sixty (60) days shall constitute a refusal of the appointment. The clerk shall notify the Governor of any such failure.

(d) *Same—Quorum; execution of papers.*—A majority of siad board shall be a quorum for the transaction of all business, and shall have full power and authority to do and perform any and all acts that the said board is by law authorized and empowered to do and perform; and the said board, or a majority thereof, may authorize any of its members by and in its name to execute on its behalf any and all papers that the said board has power and authority to execute.

(e) *Same—Incidental powers; witnesses.*—The board of Patuxent Institution shall have any and all incidental powers and authority appropriate and convenient to enable the said board to fully discharge the powers of management, control and supervision conferred upon them by this article. Said board shall have power to summon witnesses before it and to administer oaths or affirmations to such witnesses whenever, in the judgment of the board, it may be necessary for the effectual discharge of its duties under this article; and any person failing to appear before the board at the time and place specified in answer to said summons, or refusing to testify, shall be punishable by a fine of not less than

twenty-five nor more than fifty dollars; false swearing on the part of any such witness shall be deemed perjury, and shall be punished as such.

(f) *Same–Rules and regulations.*–Said board shall have full power and authority to make, repeal or amend such rules and regulations, not inconsistent with law or applicable rules and regulations of other State agencies, for the operation, discipline and conduct of the Institution, the inmates, staff and employees, by this article placed under its supervision or control, as may be necessary or convenient for the proper administration of hte power and discretion conferred upon it by this article.

(g) *Same–Interest in contracts; rewards or gifts.*–(1) No member of said board, or the advisory board hereinafter created, or any officer, member of the staff or employee of Patuxent Institution shall be directly or indirectly concerned or interested in any contract, purchase or sale made, on the recommendation of said board, or shall accept any reward or gift or any promise of any reward or gift directly or indirectly from any person interested in any contract, purchase or sale made on the recommendation of said board and every officer, member of the staff or employee of Patuxent Institution shall make report to said board of all such offenses coming to his knowledge.

(2) No member of said board, or of the advisory board hereinafter created, or any officer, member of the staff or employee of Patuxent Institution, shall accept any reward or gift, or any promise of reward or gift, from any inmate in said Institution, or from anyone on his behalf, or shall receive any devise or bequest, or any promise of devise or bequest, from any such inmate, or from any person on his behalf, or shall enter into any contract with such inmate, or with any person on his behalf. All such gifts, rewards, bequests, devises, promises and contracts shall be void.

(3) Any violation of the provisions of this subsection shall be sufficient cause, in the case of a member of said board or officer of Patuxent Institution, for removal from

office, and in the case of any other employee of the Institution for his dismissal. (An. Code, 1951, §1; 1951, ch. 476, §1; 1961, ch. 629, §1; 1962, ch. 16.)

§2. Director.

The director shall be the chief administrative officer of the Patuxent Institution, and shall be a trained, able and competent psychiatrist with at least five years' experience in the practice or teaching of psychiatry. The director holding office at the time of the passage of this section shall continue to hold office in accordance with the provisions of this section. Any successor as director shall be appointed by the Governor from a nominee or nominees proposed to the Governor by a special committee composed of the professor of psychiatry of the Medical School of the University of Maryland, the professor of psychiatry of the Medical School of the Johns Hopkins University, the chairman of the Board of Correction, and the chairman of the board of Patuxent Institution. Three members of said special committee shall be empowered in the absence of the full committee to act for the committee. The director shall receive a salary as fixed in the budget, which shall not be less than fifteen thousand dollars ($15,000.00) annually. Any director so appointed shall hold his position on probation for the first six months after assuming his duties therein and during that time shall be subject to removal by the Governor. Thereafter, he shall hold his office during good behavior, and shall be subject to removal only after charges have been preferred against him to the Governor. The director shall be notified of such charges and given a copy of them in due time to prepare an answer thereto; he shall if he so requests be heard in person or by counsel and may be removed only by direction of the Governor after such hearing. (An. Code, 1951, §2; 1951, ch. 476, §2; 1961, ch. 629, §1.)

§3. Officers and employees.

(a) *Enumeration, qualifications, duties and salaries.*—There shall be three associate directors of the said Institution. Two of said associates shall be trained, able and competent psychiatrists of at least three years' experience in the practice or teaching of psychiatry and shall assist primarily in the psychiatric and related duties of the Institution. The third of said associates shall be particularly charged, under the director, with the custodial duties of the Institution. There shall also be in the Institution at least three psychiatrists or clinical psychologists, at least four trained social workers (one of whom shall be a psychiatric social worker), a resident physician and a resident dentist, together with such other psychiatrists, psychologists, social service workers and sociologists, physicians, administrative officers, custodians, clerks and other officers and employees as may be provided in the budget from time to time. Except as otherwise provided herein, the salaries of all officers and employees in the Institution shall be as provided in the budget.

(b) *Professional positions not included in merit system; manner of appointment.*—Persons in professional positions in the said Institution, including the associate directors and all social workers and sociologists, psychiatrists, psychologists, physicians and dentists shall be appointed by the director, subject to the approval of the board of Patuxent Institution, and shall not be included in the merit system under the provisions of Article 64A of the Annotated Code. (An. Code, 1951, §3; 1951, ch. 476, §1957, ch. 762; 1961, ch. 629, §1.)

§4. Advisory board; surgical operations.

(a) *Advisory board for defective delinquents.*—The advisory board for defective delinquents is hereby established. It shall consist of the professor of psychiatry in the Medical School of the University of Maryland, or someone designated by him; the professor of psychiatry at the Johns Hopkins University Medical School, or someone designated

by him; two competent sociologists from the University of Maryland and the Johns Hopkins University, one each to be appointed by the respective presidents of these two institutions; the full-time professor of constitutional law at the University of Maryland School of Law, or if there be no such full-time professor, or if he is unable to serve, such other full-time professor of the University of Maryland School of Law as may be designated by the dean of said school; the Director of Parole and Probation; and two practicing members of the Maryland bar, with at least five years' experience in the trial of civil and/or criminal cases, appointed by the Governor to serve for a five-year term each. The advisory board shall organize by electing a chairman, and shall meet on the call of the chairman at least once in every three months. One of the members of the said board shall serve as secretary upon designation by the chairman and shall keep full and accurate minutes of such meetings and preserve the same. The members of the advisory board shall receive a per diem payment for every day spent in the duties of the board. The advisory board shall confer with the staff of the Institution, and with the board from time to time, and shall give to the Institution a general consultative and advisory service on problems and matters relating to its work.

(b) *Authority to perform surgical operation required.*— No surgical operation shall be performed as treatment of any defective delinquent except as authorized by the approval of the advisory board and also by the written consent of the defective delinquent, his nearest relative, or the order of the court. (An. Code, 1951, §4; 1951, ch. 476, §4; 1957, chs. 558, 762; 1961, ch. 629, §1.)

DEFECTIVE DELINQUENTS

§5. Defined.

For the purposes of this article, a defective delinquent shall be defined as an individual who, by the demonstration of persistent aggravated antisocial or criminal behavior, evidences a propensity toward criminal activity, and who is found to have either such intellectual deficiency or emotional unbalance, or both, as to clearly demonstrate an actual danger to society so as to require such donfinement and treatment, when appropriate, as may make it reasonably safe for society to terminate the confinement and treatment. (An. Code, 1951, §5; 1951, ch. 476, §5; 1957, ch. 558; 1961, ch. 629, §1.)

§6. Requests for examination.

(a) *For whom requests may be made.*—A request may be made that a person be examined for possible defective delinquency if he has been convicted and sentenced in a court of this State for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories; (1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State. A person convicted and sentenced for a crime or offense within one of the categories listed above in this subsection, except that such crime or offense was committed after June 1, 1954, if after said date such person is adjudged to have broken the terms of any parole or probation on which he has been released from said sentence.

(b) *Who may make requests.*—The request for such examination may be made by the Department of Correction or by the State's attorney or assistant State's attorney who prosecuted the person for a crime or offense specified here-

inabove in this section, on any knowledge or suspicion of the presence of defective delinquency in such person. Such person himself, or his attorney in his behalf, may make such a request of the court. Whenever a request for examination comes from any such source the court may order such a person to be examined by the institution for defective delinquents to ascertain if he or she is a defective delinquent. The court also may make such an order on its own initiative. A copy of any order for examination shall be served upon the person to be examined.

(c) *When requests may be made.*—Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confinement in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted.

(d) *How requests made.*—The request for such an examination shall be by petition filed with the court having custody of or jurisdiction over the said person, stating therein the reasons for *suspecting* or *supposing* the presence of defective delinquency in the said person. The court in ordering such examination shall do so by formal written order directed to Patuxent Institution. When the person to be examined is in the custody of the Department of Correction, such order shall also be directed to the Department of Correction, which shall forthwith cause the transfer of the person to the custody of Patuxent Institution.

(e) *Custody after examination ordered; jurisdiction of defendant.*—After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or

not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof, except that the Criminal Court of Baltimore City shall for such purpose have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City. (An. Code, 1951, § 6; 1951, ch. 476, § 6; 1957, ch. 558; 1960, ch. 43, § 3; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 7. Examinations.

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.*—Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent information about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, no later than six months from the date said person was received in the Institution for examination, or before expiration of his sentence, whichever last occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the costody of the Department of Correction under his original sentence as if he had not bee examined for pos-

sible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code.

(b) *Additional examinations by psychiatrists in certain cases.*—In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency, other than a request made by such person himself or by his attorney on his behalf, and whenever the court has on its own initiative ordered examination of any person, then such person shall be entitled, upon request, to be examined by a practitioner of psychiatry of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judiciary, in such amount as may be approved by the court. The report of examination made by such psychiatrist shall be submitted in writing addressed to the court. (An. Code, 1951, § 7; 1951, ch. 476, § 7; 1957, chs. 558, 762; 1961, ch. 629, § 1; 1963, ch. 283.)

§ 8. Hearings.

(a) *When required; defendant to be advised of right to counsel.*—If the institution for defective delinquents in its report on any person shall state that he is a defective delinquent, the court shall forthwith summon the person before it and advise him of the substance of the report and of the pendency of the hearing hereinafter provided; the court shall further advise him of his right to be represented at said hearing by counsel of his choice, or if he has no choice, by competent counsel appointed by the court.

(b) *Appointment and rights of counsel.*—Unless appearance of counsel chosen by the person is entered within twenty days following the proceeding set forth in subsection (a) hereof, the court shall appoint counsel to represent the person. Counsel for the person and for the State shall have access to all records, reports and papers of the institution relating to the person, and to all papers, in the possession of the court bearing upon the person's case, including a copy of the report of the institution.

(c) *When hearing held; jury.*—The hearing for determination of defective delinquency shall be held no less than thirty days following designation of counsel, unless acceleration of the time is requested by the person or his counsel. Upon the application of the State or of the person for a jury trial, or upon its own motion, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. The court shall direct such jury after hearing to find specially, by its verdict, whether the person is a defective delinquent as defined in §5. In the absence of request for finding by a jury, the court may make such determination sitting as judge and jury. (An. Code, 1951, §8; 1951, ch. 476, §8; 1957, ch. 762; 1960, ch. 43, §3; 1961, ch. 629, §1; 1963, ch. 283.)

§9. Sentence.

(a) *When defendant found not to be a defective delinquent.*—If the court or the jury, as the case may be, shall find and determine that the said defendant is not a defective delinquent, the court shall order him returned to the custody of the Department of Correction, and he shall begin or resume his period of confinement on said convictions as if he had not been examined for possible defective delinquency. Provided, however, that the said defendant shall be returned to custody under his original sentence with full credit for such time as he has already spent in the institu-

tion for defective delinquents or within the costody of the Department of Correction including such allowances (or disallowances) relating to good behavior and&or work performed as the Board of Correction may determine under the provisions of §688 of Article 27 of the Code.

(b) *When defendant found to be a defective delinquent.*—If the court or the jury, as the case may be, shall find and determine that the said defendant is a defective delinquent, the court shall so inform the defendant, and shall order him to be committed or returned to the institution for confinement as a defective delinquent, for an indeterminate period without either maximum or minimum limits. In such event, the sentence for the original criminal conviction, or any unexpired portion thereof, shall be and remain suspended, and the defendant shall no longer be confined for any portion of said original sentence, except as otherwise provided herein. Instead, the defendant shall thenceforth remain in the custody of the institution for defective delinquents, subject to the provisions of this article. (An. Code, 1951, §9; 1951, ch. 476, §9; 1957, ch. 762; 1961, ch. 629, §1.)

§10. Petition for review.

(a) *Who may file; hearing and determination.*—After any person shall have been committed under §9(b) as a defective delinquent, shall have been confined for two years after such commitment, and shall have been confined for a total period, including any period of confinement under his original sentence prior to commitment under §9(b), equal to two thirds of his original sentence, such person or anyone in his behalf, including the direcotr or any officer or employee of Patuxent Institution, may file a petition requesting that such person be brought before the court in which such petition is filed for the purpose of having the defective delinquency of such person redetermined. Such a petition may be filed in the law courts of the county of Baltimore City, as the case may be, either where such person was originally sentenced or which was the bona fide residence of such

person when originally sentenced. The court shall forthwith proceed to hear and determine the matter. If the person so confined, or anyone in his behalf, shall pray a jury trial, the court shall empanel a jury of twelve persons to be selected by the court from the jurors then in attendance upon said court; or if the court is in recess, the jurors shall be selected from those in attendance at the term of court at which said petition is heard. Any party in interest shall have the right to counsel and to process to compel the attendance of witnesses. If the court or jury, as the case may be, shall determine that such person is a defective delinquent, the court shall order said person recommitted to the institution from which he immediately came; otherwise he shall be discharged from such confinement and custody, or in the discretion of the court committed under his original sentence, less such time as he has already served in the institution for defective delinquents or within the custody of the Board of Correction, including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code which shall apply to such person's period of confinement to Patuxent Institution with any variation of the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case.

(b) *Application for further review not to be made within three years.*—After the right to apply for any such petition for review under the provisions of this section shall have been exercised once, it shall not again be sought under the provisions of this section within less than three years following the prior seeking of a petition for review from confinement under the same commitment.

(c) *Right to petition for habeas corpus not affected.*—The right to review specified in this section shall not be construed to deprive the defendant of his right to petition for habeas corpus as it might otherwise exist. (An. Code, 1951, § 10; 1951, ch. 476, § 10; 1957, chs. 378, 762, 1961, ch. 629, § 1.)

§11. Appeal.

From any court order issued under the provisions of §9, or of §10, within thirty (30) days after the passage of the order, application may be made to the Court of Special Appeals for leave to appeal from the order. The application for leave to appeal shall be in such form as the Court of Special Appeals may, by its rules, prescribe. If the Attorney General or the State's attorney shall state an intention to file an application for leave to appeal, the order may be stayed. If the application for leave to appeal is granted, the procedure for appeal shall conform with the rules of the Court of Special Appeals. On appeal, the Court may affirm, reverse or modify the order appealed, or it may remand the case for further proceedings. If the application for leave to appeal is denied, the order sought to be reviewed shall become final. (An. Code, 1951, §11; 1951, ch. 476, §11; 1957, ch. 558; 1960, ch. 43, §3; 1961, ch. 629, §1; 1966, ch. 12, §5.)

§11A. Same—Poverty of defendant.

Whenever a defendant desires to file an application for leave to appeal in order to appeal as provided in §11, and is unable by reason of poverty to pay the cost of the application and of appeal, he may file, with the court making the order from whcih appeal is sought, a petition under oath alleging the fact of his proverty and his inability to defray the expense of making application and of appealing. the court upon being satisfied of the defendant's poverty shall sign an order directing that all costs, including but not limited to, all court costs, the cost of preparing the transcript of testimony, the cost of preparing and transmitting the record, and the cost of the briefs, appendices and printed record extract necessary in connection with the appeal shall be paid by the political subdivision from which the appeal is taken and that the record shall be transmitted to the Court of Special Appeals at the expense of the political subdivision. A copy of the order shall be included in the record transmitted to the Court of Special Appeals and

the payment of all filing fees to the Clerk of the Court of Special Appeals in connection with the appeal are waived. If counsel prosecuting the appeal on behalf of the defendant has been appointed as such counsel by the court making the order appealed from or by the Court of Special Appeals, the Court of Special Appeals may allow him a fee in an amount which the Court shall think proper for his services in the appeal, the fee to be paid by the political subdivision. (1960, ch. 43, § 3; 1961, ch. 629, § 1966, ch. 12, § 5.)

INSTITUTIONAL BOARD OF REVIEW

§ 12. Composition; quorum; vacancy.

The institutional board of review shall consist of the director, the three associate directors, the professor of the University of Maryland School of Law who is a member of the advisory board, the member of the Maryland bar, who of the two who are members of the advisory board has served thereon the longer, and a sociologist to be appointed by the board of Patuxent Institution from the faculty of an accredited institution of higher education in Maryland. Four members, including either the professor of law, the member of the bar, or both of them, shall constitute a quorum. The board of Patuxent Institution if the position of director is vacant, or the director if a position of associate director is vacant, shall appoint from the staff of the Institution a substitute member of the institutional board of review or serve during the vacancy. (An. Code, 1951, § 12; 1951, ch. 476, § 12; 1961, ch. 629, § 1.)

§ 13. Duties.

(a) *Part of regular duties in Institution.*—The members of the institutional board of review and such other members of the staff whom the director shall designate to attend with the said board as advisors shall serve in such capacity as part of their regular work and duties in the Institution.

(b) *Review and reexamination of defective delinquents.*—The institutional board of review shall review and thoroughly reexamine every person held in custodial care as a defective delinquent, not less frequently than once in every calendar year. Such review and reexamination shall be to determine whether such person shall remain classified as a defective delinquent, and in making such determination the board assemble such information, use such tests and follow such procedures as then are being utilized in the first instance by the institution for defective delinquents to indicate the presence of defective delinquency. The board shall make a recommendation for the future status and treatment of each person so reviewed and reexamined, in writing, and a copy of every such recommendation shall be filed with the records of the Institution.

(c) *Recommendation that defective delinquent remain so classified.*—If the institutional board of review in its review and reexamination of any person shall ascertain that he shoudl remain classified as a defective delinquent and receive further treatment as such; it shall so state in its written recommendation filed with the Institution.

(d) *Leave of absence or parole from Instituttion.*—If the institutional board of review as a result of its review and reexamination of any person believes that it may be for his benefit and for the benefit of society to grant him a leave of absence or parole from the institution for defective delinquents, it may proceed to arrange for such leave or parole. Any leave of absence or parole shall be granted for a period not to exceed one year. The board shall review the case before the expiration of that time and may review it at any time during the year, in order to make further or alternate determination. The board may attach to any such leave of absence or praole such conditions as to it seem wise or necessary, including arrangements for the care and supervision of the person granted a leave or parole, by his friends or elatives, by the institution for defective delinquents or by the Department of Parole and Probation, and also includ-

ing as a condition that the said person shall be steadily employed or otherwise occupied during the time of such leave or parole. The board may at any time revoke a leave or parole, or change the conditions and arrangements therefor. The board may also request the court which imposed upon the person the original sentence resulting in his being subsequently classified as a defective delinquent, to reinstate the said original sentence; and the said court is authorized and empowered following such a request to reinstate and reimpose the said original sentence, and to cause the said person to be held in custody therefor, as provided hereinbelow.

(e) *Employment outside of Institution; collection and disbursement of earnings.*—The leave of absence that may be granted by the institutional board of review may be limited to hours during which a person is suitably employed outside the Institution on such terms as are deemed fair and reasonable by the said board. The earnings from such employment shall be collected by the said board, and from them the said board shall pay to the Institution an amount deemed reasonable by the said board in the particular case for such person's board, lodging, supervision and treatment, shall pay to such person or on his behalf amounts necessary for his travel and other proper expenses outside the Institution, and shall accumulate the remainder in a fund held for such person's benefit. If such person is later granted parole or leave of absence not limited to hours of employment the board may pay him from such fund amounts deemed necessary and proper by the board, and upon such person's unconditional release from custody, or upon his death, the board shall pay the entire remaining fund to him or his estate. If said person is later transferred to the custody of the Department of Correction, any such fund shall be transferred to the Department of Correction to be held in a separate account for said person, and shall be subject to applicable rules for the disbursement thereof as are established by the Board of Correction. While any such fund is held the board shall pay from its amounts directed to be

paid by order of court for the support of such person's dependents, but the fund shall otherwise be exempt from attachment, levy, or lien, and any contract or agreement whereby such person shall purport to waive such exemptions shall be void.

(f) *When court to release from custody of Institution or grant leave of absence or parole.*—If the institutional board of review as a result of its review and reexamination of any person believes that he has sufficiently improved to warrant his unconditional release from custody as a defective delinquent, it shall so inform whatever court has jurisdiction over the person. The court then shall make such further study of such person as seems necessary, and may at its discretion summon such person before it for a further hearing, together with any witnesses whose testimony may be pertinent and together with any relevant documents or other evidence. On the basis of such reports, study and possible hearing, the court shall determine whether the person before it shall be released unconditionally from custody as a defective delinquent, released conditionally on a leave of absence or parole, returned to the custody of the Institution as a defective delinquent, or returned to the Department of Correction, to serve the original sentence upon which he was committed prior to being classified as a defective delinquent. Upon return of a person to the custody of the Department of Correction there shall be deducted from the original sentence all time spent in the custody of Patuxent Institution and in the custody of the Department of Correction. The Department shall make such allowances or (disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of §688 of Article 27 of the Code, Patuxent Institution shall furnish the Department of Correction with such information from the records of such person's period of confinement in the Institution as the Board of Correction shall reasonably require for determining the application of the said §688, which shall apply to such person's period of commitment to Patuxent Institution with any variation of

the regulations issued under said section as the Board of Correction shall consider appropriate in the particular case. The power of the court to provide for a leave of absence or parole for any such person before it shall be the same as that of the institutional board of review, described hereinabove in this section, except that once the person has entered upon the leave of absence or parole, the board shall have the administration of the terms and conditions of the leave or parole as set by the court. If the person before the court is returned to the custody of the Institution as a defective delinquent, it shall continue to be for an indefinite period, without either maximum or minimum limits, subject to the review and reexamination by the institutional board of review, as provided hereinabove in this section. (An. Code, 1951, § 13; 1951, ch. 476, § 13; 1957, ch. 762; 1961, ch. 629, § 1.)

SUPPLEMENT

ARTICLE 31B

DEFECTIVE DELINQUENTS

§ 3. Officers and employees.

(a) *Enumeration, qualifications, duties and salaries.*—There shall be three associate directors of the said Institution. One of said associates shall be a trained, able, and competent psychiatrist of at least three years' experience in the practice or teaching of psychiatry; and one of said associates shall be a trained, able, and competent behavioral scientist of at least three years' experience in the practice or teaching of his speciality; and said associates shall assist primarily in the diagnostic and treatment duties of the Institution. The third of said associates shall be particularly charged, under the director, with the custodial duties of the Institution. There shall also be in the Institution at least three psychiatrists or clinical psychologists, at least four trained social workers (one of whom shall be a psychiatric social worker), a physician, and a dentist, together with such other psychiatrists, psychologists, social service workers and sociologists, physicians, administrative officers, custodians, clerks, and other officers and employees as may be provided in the budget from time to time. Except as otherwise provided herein, the salaries of all officers and employees in the insitution shall be as provided in the budget. (1969, ch. 115.)

§ 6. Requests for examination.

(e) *Custody after examination ordered; jurisdiction of defendant.*—After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, with-

out regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof, except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purpose have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively. (1967, ch. 348.)

INSTITUTIONAL BOARD OF REVIEW

§ 12. Composition; quorum.

The institutional board of review shall consist of the director, the three associate directors, the professor of the University of Maryland School of Law who is a member of the advisory board, either of the members of the Maryland bar who are members of the advisory board and a sociologist to be appointed by the board of Patuxent Institution from the faculty of an accredited institution of higher education in Maryland. Four members, including either the professor of law or one of the members of the bar who is a member of the advisory board shall constitute a quorum. (An. Code, 1951, § 12; 1951, ch. 476, § 12; 1961, ch. 629, § 1; 1968, ch. 144.)

§ 14. Not to affect juvenile courts; adults convicted in juvenile courts.

Nothing in this article shall be construed to extend to or affect any case in a juvenile court or in the court of a magistrate for juvenile causes, or any person involved in such case, unless the juvenile court judge shall have waived jurisdiction in the case so that it may be heard and adjudicated in a regular criminal court. Provided, however, that the provisions of this article shall apply to any adult who has been found guilty and sentenced by one of the several juvenile

courts in this State when said juvenile court is exercising its original jurisdiction as provided in §§53 and 55 of Article 26 of the Annotated Code of Maryland. (An. Code, 1951, §14; 1951, ch. 476, §14; 1959, ch. 643; 1961, ch. 629, §1.)

§ 15. Not to affect magistrate courts; Baltimore City.

Nothing in this article shall be construed to extend to or affect any case in the court of a magistrate or justice of the peace, or any person involved in such case, unless by reason of a request for a jury trial or for other cause the case shall be heard and adjudicated in a regular criminal court. Provided, however, that the Criminal Court of Baltimore City shall have jurisdiction of a person convicted and sentenced by the Municipal Court of Baltimore City if the crime, offense, crimes or offenses, for which he has been convicted and sentenced are within one or more of the categories listed in §6 of this article. (An. Code, 1951, §15; 1951, ch. 476, §15; 1961, ch. 629, §1.)

ADMINISTRATIVE PROVISIONS

§ 16. Certain transfers between institutions.

(a) *Person sentenced for offense committed prior to June 1, 1954.*—Any person imprisoned on a sentence for a crime or offense committed before June 1, 1954, may, by agreement between the Department of Correction and Patuxent Institution and without court proceedings, be transferred to Patuxent Institution for examination as a possible defective delinquent and, if so diagnosed, may be similar agreement be detained there for the duration of his sentence or any part thereof.

(b) *Transfer to Institution for employment.*—Any person in the custody of the Department of Correction may be transferred to Patuxent Institution for employment there by agreement between the Institution and the Department of Correction.

(c) *Diminution of sentence.*—The sentence of any person transferred to Patuxent Institution under the provisions of this section shall be subject to the same diminution for behavior, work and training as though said person had remained in the custody of the Department of Correction.

(d) *Transfer from Institution for employment, treatment or imprisonment.*—Any person in the custody of Patuxent Institution may be transferred, by agreement between the Institution and the Department of Correction, to the custody of the Department of Correction for employment on a prison farm or in any work project or for hospitalization or for other treatment for illness or for imprisonment; provided, however, that except in cases of transfer for hospitalization or treatment for illness it shall first be found by the institutional board of review that such transfer will not reduce or retard the prospect of such person's release from confinement as a defective delinquent, and provided further that such person, notwithstanding transfer, shall remain committed to Patuxent Institution and shall be returned there at least annually for reexamination by the institutional board of review. (An. Code, 1951, § 16; 1951, ch. 476, § 16; 1953, ch. 516; 1955, ch. 244; 1961, ch. 629, § 1.)

§ 17. Supplying goods, wares, merchandise and produce to "consuming institutions."

The board of Patuxent Institution is hereby empowered to determine from time to time whether, and to what extent, persons in the custody of said Institution and selected by its director, shall supply goods, wares, merchandise and produce required to be purchased by "consuming institutions" as defined in Article 27, § 680 of the Annotated Code of Maryland. (1961, ch. 629, § 1)

§ 18. Record of inmate.

(a) *Description recorded; photograph; Bertillon method.*—Said Institution shall record or cause to be recorded a description of every person committed to it as a defective

shall attach thereto as part of said record a photograph or photographs of such person. For the purpose of obtaining accurate descriptions of such persons, the director is hereby authorized to adopt the Bertillon method of measurement and registration or such other method as shall be adequately descriptive.

(b) *Criminal history forwarded by State's attorney.*—In order to accomplish the purposes of subsection (a), the State's attorney of any county or city, in which any person has been found to be a defective delinquent, is hereby direction to forward promptly to said Institution and upon blanks furnished by it, a criminal history of such person as fully as the same is known or can be ascertained by such State's attorney.

(c) *Accessibility of record; admissible in evidence.*—The record herein provided for shall not be made public except as may be necessary in the identification or trial of persons accused of crime and except as provided in this section. The record shall be accessible, however, to any officer of any court having criminal jurisdiction in this State, upon the order of the judge of said court, or of the State's attorney, which said order shall be attested by the seal of the court. Whenever, in the trial of any person, the fact of previous conviction of any person for any crime may be admissible, any such record shall be admissible in evidence for the purposes of proving the fact of the conviction and the crime for which such defective delinquent was convicted.

(d) *Copy to warden or other officer in reciprocal state.*—A copy of such record shall be furnished, upon request, to any warden or other officer in charge of a prison for felons in any other state of the United States; provided that such state has made reciprocal provisions by law for furnishing records of its convicted criminals to the authorities of this State.

(e) *Copy to police officer upon signed order.*—Said Institution shall furnish a copy of such record of any defective delinquent to any police officer presenting an order for such

copy signed by the officer in charge of police of any county or municipality.

(f) *Trial data forwarded by clerk; fee.*—Whenever a person shall be convicted of crime and committed to the said Institution, the clerk of the court involved shall, unless advised by said Institution that records are available from the Department of Correction, make and forward as soon as practicable, but not later than thirty days from time of commitment, to said Institution, a record containing, with regard to the criminal trial, a short copy of the docket entries, the name and address of the judge presiding at the trial, the State's attorney and sheriff, and the names and addresses of the jurors and the names of the witnesses sworn on the trial, together with a statement of any facts which the presiding judge may deem important or necessary for a full comprehension of the case. In each case in which he shall perform the duties required by this section, the clerk of the court shall be entitled to one dollar as compensation, which shall be taxed as a part of the costs of said case.

(g) *Interchange of records and information.*—For the purpose of increasing the efficiency in the treatment, management and rehabilitation of persons committed to said Institution there shall be full and complete interchange between said Institution and the Departments of Correction and of Parole and Probation of records and all pertinent information relating to each of the persons so committed. It shall be the duty of said Department to provide the procedures and methods for the interchange of the records and information as required by this section. (1961, ch. 629, § 1.)

§ 19. Federal grants or loans.

Upon the approval of the Board of Public Works, the board of Patuxent Institution is hereby empowered in its discretion to apply for and receive from the federal government or any board, bureau, commission, department or other agency thereof any funds, chattels, or foodstuffs by way of grant or loan that may be available to be used in the establishment, maintenance or program of the said Institution. (1961, ch. 629, § 1.)

APPENDIX B

May 12, 1970

The Honorable Clement F. Haynsworth
Chief Judge
United States Court of Appeals for
the Fourth Circuit
10th & Main Streets
Richmond, Virginia

Re: Avey, Daniel, Sass Appeals - No. 13,415, et seq.

May It Please Your Honor:

At the oral hearing of this matter on May 8, 1970, Your Honor addressed two questions to Counsel for the Appellants and suggested that we file a brief letter memorandum indicating references to the record which supported our position:

I. UTILIZATION OF THE TRANSFER PROVISIONS OF THE DEFECTIVE DELINQUENT ACT.

At page 543 of the Joint Record Extract in this Court (App. 543) is a letter which was originally introduced in the Circuit Court for Prince George's County, Maryland, pertaining to the utilizations of the transfer provisions of Section 13(d) wherein one James H. Craig, the cell mate of Sammy Daniels, was requested to be transferred back to the penal system. The Institutional dossier on Charles Mason Tippett, a record before Your Honor, also indicates that he was, at one time, transferred back to the penitentiary. These are the only two cases that Counsel for the Appellants is aware of, although there may have been others since we did not examine all the records of Patuxent pertaining to the transfer provisions of the Act.

II. PERSONAL INTERPRETATION OF THE ACT.

Your Honor had requested a citation to the record during my remarks, and that of the *amicus*, as to whether any of the expert witnesses had indicated that the Act was being

interpreted and/or could be interpreted depending upon individual viewpoints. Page 267 of the Record before the Court of Appeals of Maryland, in Appeal No. 520 (E. 267) contains the testimony of Dr. Manfred Guttmacher as to the possibilities, if there was an inappropriate individual who was the head of Patuxent.

We trust this answers Your Honor's inquiries.

Yours very truly,

Karl G. Feissner

KGF:br
cc: The Honorable Simon E. Sobeloff
Circuit Judge
The Honorable John D. Butzner, Jr.
Circuit Judge
Alfred J. O'Farrell, III, Esq.,
Assistant Atttorney General